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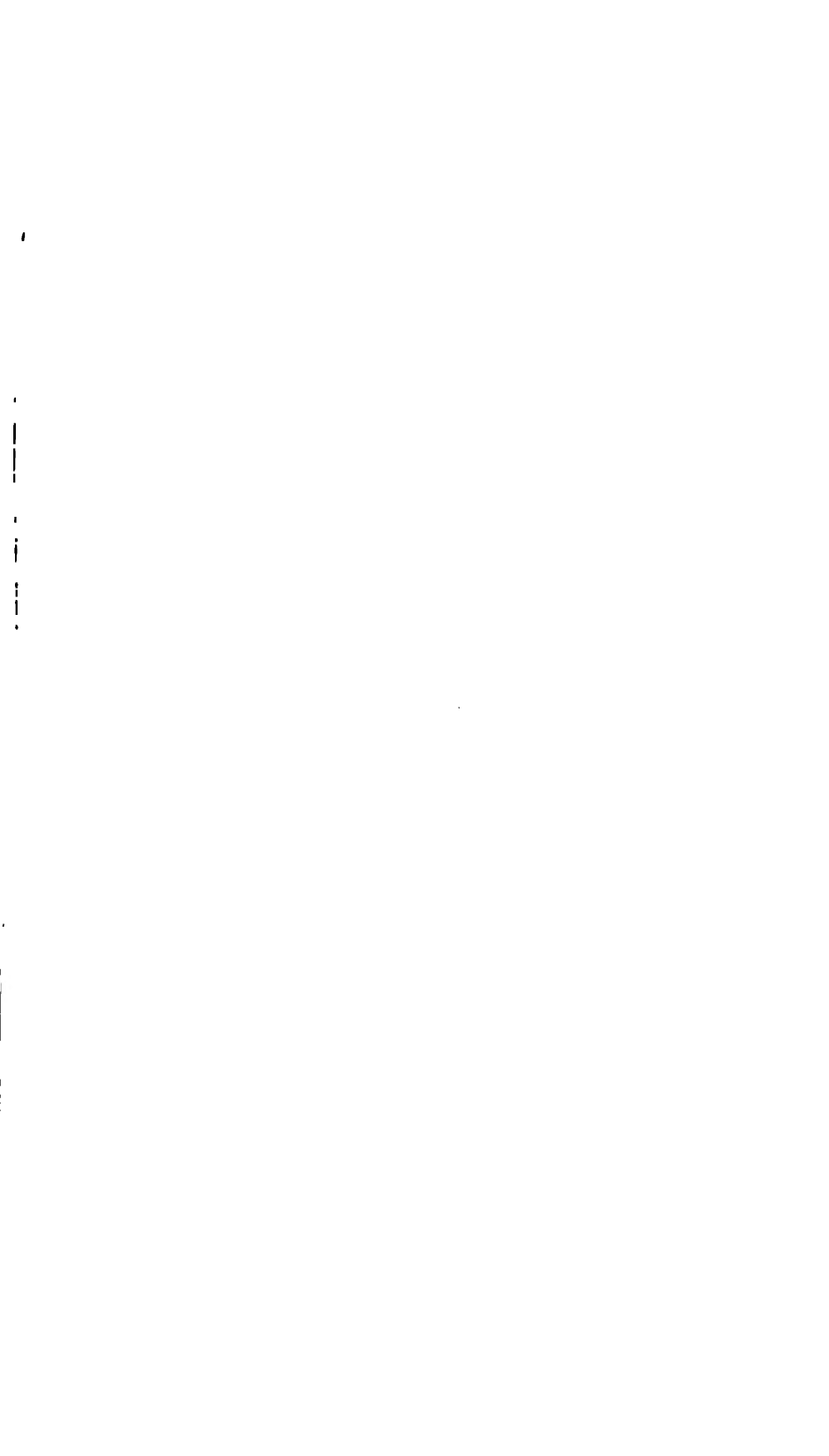
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THE
AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES ON
POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

BY WM. W. LADD, JR.

VOL. IV.

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TABLE OF CASES REPORTED.

	PAGE
BACON <i>v.</i> RANSOM, (139 Mass. 117.)	364
PRECATORY WORDS.—TRUST.	
BAKER'S APPEAL, (107 Penn. St. 381.)	128
SIGNING AT "END OF" WILL.—DOCUMENT MADE PART OF WILL.	
BARNUM <i>v.</i> MAYOR OF BALTIMORE, (62 Md. 275.)	291
CHARITABLE USE.—CERTAINTY OF BENEFICIARY.—DEVISE CONDITIONAL ON RELIGIOUS CONNECTION.	
BARRY <i>v.</i> LAMBERT, (98 N. Y. 300.)	149
EXECUTOR MINGLING FUNDS OF ESTATE AND THIRD PARTY IN LOAN.	
BELLOWS <i>v.</i> SOWLES, (57 Vt. 164.)	529
AGREEMENT NOT TO OPPOSE PROBATE OF WILL.—PROMISE BY EXECUTOR TO ANSWER FROM HIS OWN ESTATE.	
BETTS <i>v.</i> HARPER, (39 Ohio St. 639.)	429
JOINT WILL BY TENANTS IN COMMON.	
BIRMINGHAM <i>v.</i> LESAN, (76 Maine, 482.)	268
LIFE-ESTATE.—POWER OF DISPOSAL.	
BRINLEY <i>v.</i> GROU, (50 Conn. 66.)	324
INCREASE IN STOCK.—PRINCIPAL OR INCOME.	
BYERS <i>v.</i> HOPPE, (61 Maryland, 206.)	218
WILL IN FORM OF A LETTER.	
CLARK <i>v.</i> ATKINS, (90 N. C. 629.)	97
BONDS INCLUDED UNDER "BANK STOCK."	

	PAGE
COIT <i>v.</i> COMSTOCK, (51 Conn. 352.)	164
CHARITABLE USE.—CORPORATION TO BE ORGANIZED.— DEVISE TO KEEP BURIAL LOT IN REPAIR.	
COLLINS <i>v.</i> FOLEY, (63 Md. 158.)	510
POWER TO LEASE.—LEASE FOR NINETY-NINE YEARS.— RULE AGAINST PERPETUITIES.	
COLLINS <i>v.</i> MACTAVISH, (63 Md. 166.)	586
POWER TO MAKE INVESTMENTS.—LEASE FOR NINETY-NINE YEARS.	
CRAWFORD <i>v.</i> THOMPSON, (91 Ind. 266.)	57
CONDITION SUBSEQUENT AND TRUST.—CONDITION AGAINST SECOND MARRIAGE VOID.	
CROSSMAN <i>v.</i> CROSSMAN, (95 N. Y. 145.)	121
PROOF OF WILL EXECUTED IN DUPLICATE.—INTERLINEA- TIONS IN WILL.	
CUMMINGS <i>v.</i> PLUMMER, (94 Ind. 403.)	279
"CHILDREN."—"GRANDCHILDREN."	
DEVLIN <i>v.</i> COMMONWEALTH, (101 Penn. St. 278.)	76
ADMINISTRATION ON ESTATE OF LIVING PERSON.	
DODGE'S APPEAL, (106 Penn. St. 216.)	357
WIDOW NOT "HEIR" OF HUSBAND.	
ELLICOTT <i>v.</i> CHAMBERLIN, (38 N. J. Eq. 604.)	235
AGREEMENT TO RENOUNCE EXECUTORSHIP.	
ESCHBACH <i>v.</i> COLLINS, (61 Maryland, 478.)	17
ALTERATION OF WILL BY OBLITERATION.	
FAIRFIELD <i>v.</i> LAWSON, (50 Conn. 501.)	36
CHARITABLE USE.—INDEFINITENESS.—EVIDENCE TO SHOW INTENDED BENEFICIARIES.	
FARISH <i>v.</i> COOK, (78 Missouri, 212.)	156
CONSTRUCTION.—"ALL MY WORLDLY GOODS."—REAL ESTATE NOT INCLUDED.	

TABLE OF CASES REPORTED.

v

	PAGE
FAULK v. DASHIELL , (62 Texas, 642.)	81
POWER TO SELL INCLUDING POWER TO MORTGAGE.	
FIDELITY TRUST CO.'S APPEAL , (2 East. R. 261.)	556
SPECIFIC LEGACY—WILL SPEAKING FROM DATE OF EXECUTION.	
FITE v. BEASLEY , (12 B. J. Lea, 328.)	274
REQUEST TO ERECT AND KEEP IN REPAIR MONUMENT.—PERPETUITY.	
GAY v. GAY , (60 Iowa, 415.)	360
REVOCATION BY CANCELING SIGNATURE.	
GIBSON v. SEYMOUR , (102 Ind. 485.)	517
DEVISE.—CONDITIONAL ON SURVIVORSHIP OF LIFE-TENANT.	
GILMAN v. MCARDLE , (99 N. Y. 451.)	399
PROVISION FOR SAYING MASSES.	
GOODALE v. MOONEY , (60 N. H. 528.)	1
CHARITABLE USE.—DISTRIBUTION IN JUDGMENT OF EXECUTORS.	
GRAHAM v. GRAHAM , (23 West Va. 36.)	181
SUPPLYING WORDS.—PARTIAL INTESTACY.	
HARKER v. SMITH , (41 Ohio St. 236.)	525
PROVISION FOR SERVICES TO ESTATE.—CONTRACT.—LEGACY.	
HEIGHE v. LITTIG , (63 Md. 301.)	537
PARTNERSHIP PROFITS.—LIFE-TENANT AND REMAINDERMAN.	
HIBBITS v. JACK , (97 Ind. 570.)	500
CONDITIONS IN RESTRAINT OF MARRIAGE.—STATUTE.	
HINKLEY v. THATCHER , (139 Mass. 477.)	483
EVIDENCE TO DETERMINE BENEFICIARY OF CHARITABLE USE.	
HOPE v. WILKINSON , (14 B. J. Lea, 21.)	213
SUBROGATION OF LEGATEE TO CREDITOR.	

	PAGE
HOSPITAL TRUST CO. <i>v.</i> COM'L BK., (1 New Eng. R. 20.) .	563
LIFE-ESTATE NOT ENLARGED TO FEE BY POWER OF SALE.— MORTGAGE BY LIFE-TENANT.	
HURLEY <i>v.</i> O'SULLIVAN, (137 Mass. 86.)	31
OMISSION OF CHILD FOUNDED ON MISTAKE OF LAW	
HYLAND <i>v.</i> BAXTER, (98 N. Y. 610.)	478
INCIDENTAL EQUITY JURISDICTION OF SURROGATE'S COURT.	
IVINS' APPEAL, (106 Penn. 176.)	176
HUSBAND NOT HEIR OR NEXT OF KIN TO WIFE.	
JOHNSON <i>v.</i> LAWRENCE, (95 N. Y. 154.)	328
DOUBLE COMMISSIONS.—EXECUTOR AND TRUSTEE.	
KNOX <i>v.</i> KNOX, (59 Wis. 172.)	46
PRECATORY WORDS.—DEVISE WITH REQUEST FOR DIVIS- ION BY DEVISEE.	
LOCKMAN <i>v.</i> REILLY, (95 N. Y. 64.)	194
EXECUTORS PURCHASING ON FORECLOSURE SALE.	
MARSHALL <i>v.</i> CARSON, (38 N. J. Eq. 250.)	201
EXECUTOR PURCHASING AT SALE OF TESTATOR'S PROPERTY.	
MATTER OF BENSON, (96 N. Y. 499.)	7
EFFECT OF ACCEPTANCE OF PROVISION IN LIEU OF DOWER.	
MATTER OF WILL OF COTTRELL, (95 N. Y. 329.)	442
ATTESTATION CLAUSE.—CONTRADICTED BY SUBSCRIBING WITNESSES.	
McCLOSKEY <i>v.</i> GLEASON, (56 Vermont, 264.)	101
LIABILITY OF ADMINISTRATOR FOR MISAPPROPRIATIONS OF AGENT.	
MITCHELL <i>v.</i> MORSE, (77 Me. 423.)	508
DEVISE IN FEE.—REMAINDER OVER.	
MONTAGUE <i>v.</i> ALLAN'S EX'RS, (78 Va. 592.)	454
CIRCUMSTANTIAL EVIDENCE OF TESTATOR'S KNOWLEDGE OF WILL.	

TABLE OF CASES REPORTED.

vii

	PAGE
MORIN v. RAILROAD , (38 Minn. 176.)	462
FOREIGN JUDGMENT AS EVIDENCE OF DEATH OR HEIRSHIP.	
NEW ENGLAND TRUST CO. v. EATON , (3 East. R. 495.)	368
BONDS PURCHASED BY TRUSTEE AT PREMIUM.—INCOME AND CAPITAL.—LIFE-TENANT.—REMAINDERMAN.	
NORWOOD v. HARNESS , (98 Ind. 184.)	244
ADMINISTRATOR'S LIABILITY.—LOSS OF DEPOSIT IN PRIVATE BANK.	
PECK'S APPEAL , (50 Conn. 562.)	306
REVIVAL OF EARLY WILL OR REVOCATION OF LATER.	
PHILLIPS v. PHILLIPS , (81 Ky. 328.)	258
COSTS OF EXECUTOR FAILING TO ESTABLISH WILL.	
PHOENIX v. LIVINGSTON , (4 East. R. 307.)	570
DOUBLE COMMISSIONS.—COMMISSIONS OF TRUSTEES OF LIFE-ESTATE.	
PORTER v. JACKSON , (95 Ind. 210.)	226
LEGACY.—PERSONAL CHARGE ON DEVISEE.	
PRICE v. COURTNEY , (2 Western R. 458.)	575
POWER OF SALE NOT POWER TO MORTGAGE.—SUBROGATION ON LOAN TO EXECUTOR.	
PRICHARD v. THOMPSON , (95 N. Y. 76.)	92
CHARITABLE USE.—INDEFINITENESS AND UNCERTAINTY OF DEVISE.	
QUINN v. SHIELDS , (62 Iowa, 129.)	386
CHARITABLE DEVISE.—BENEFICIARIES TO BE SELECTED BY LIFE-TENANT.	
RICHARDSON v. RICHARDSON , (75 Maine, 570.)	352
TENANT FOR LIFE.—EXTRA DIVIDENDS.	
RIVENETT v. RIVENETT , (53 Mich. 10.)	264
DEVISE TO "SURVIVORS OR THEIR LEGAL REPRESENTA- TIVES."	

	PAGE
ROBINS <i>v.</i> MCCLURE, (3 East. R. 115.)	466
HUSBAND'S RIGHT TO PERSONALTY OF WIFE DYING PARTIALLY INTESTATE.	
SCHOLLE <i>v.</i> SCHOLLE, (3 East. R. 762.)	496
EFFECT OF PERMISSION TO TRUSTEE TO PURCHASE TRUST PROPERTY.	
SECURITY COMPANY <i>v.</i> BRYANT, (52 Conn. 311.) . . .	552
ABATEMENT OF BEQUEST IN LIEU OF DOWER.	
SHIMER <i>v.</i> MANN, (99 Ind. 190.)	310
RULE IN SHELLEY'S CASE.	
SIMPSON <i>v.</i> SIMPSON, (2 Northeast. R. 258.)	435
ADVANCEMENT TO PARENT A BAR TO CLAIM OF HIS CHILDREN.	
SOUTH <i>v.</i> SOUTH, (91 Ind. 221.)	69
EXECUTION OF POWER TO CONVEY FEE.—RECITAL OF INSTRUMENT CREATING POWER.	
SOWERS <i>v.</i> CYRENIUS, (39 Ohio St. 29.)	541
CHARITABLE USE.—INDEFINITENESS.	
SWAN <i>v.</i> HAMMOND, (138 Mass. 45.)	534
REVOCATION BY MARRIAGE.—STATUTORY PROVISIONS.	
THAYER <i>v.</i> SPEAR, (3 East. R. 734.)	451
BEQUEST ON CONDITION OF HUSBAND'S DEATH.—PUBLIC POLICY.	
THOMAS <i>v.</i> PEOPLE, (107 Ill. 517.)	284
ADMINISTRATION ON LIVING PERSON'S ESTATE.	
TOWNSEND'S APPEAL, (106 Penn. St. 268.)	432
INTEREST ON LEGACY FOR MAINTENANCE.	
VAN HORNE <i>v.</i> CAMPBELL, (3 East. R. 84.)	409
EXECUTORY DEVISE DEPENDING ON NON-EXECUTION OF POWER OF DISPOSITION.	

TABLE OF CASES REPORTED.

ix

	PAGE
VAN STEENWYCK v. WASHBURN, (59 Wisc. 483.) .	337
ELECTION BY COURT FOR INSANE WIDOW.	
WHITE v. DITSON, (1 New Eng. R. 485.)	589
LANGUAGE CREATING A TRUST.—EXECUTOR WHO IS ALSO TRUSTEE.—DISCHARGE OF.—LIABILITY OF SURETIES ON BOND OF.	
WILL OF LADD, (60 Wisc. 187.)	137
REVOCATION.—NOT ATTESTED ACCORDING TO STATUTE.	
WISTAR v. SCOTT, (105 Penn. St. 200.)	548
DEVISE TO "MALE ISSUE."	
YOUNGER v. DUFFIE, (94 N. Y. 535.)	544
SIGNING "AT END" OF WILL.	
<hr/>	
INDEX,	605

TABLE OF CASES CITED.

- | | |
|---|---|
| <p> Abercrombie v. Skinner, 120.
 Adams v. Claxton, 119, 250.
 Adams v. Clifton, 119.
 Adnam v. Cole, 276.
 Albany Fire Ins. Co. v. Bay, 88, 90, 570.
 Alexander v. Miller, 216.
 Alexander v. Summey, 98.
 Allen v. Backhouse, 91.
 Allen v. Dundas, 79, 285.
 Allen v. Jackson, 66.
 Allen v. Maddock, 130.
 Allen v. Mayfield, 523.
 Allen v. McPherson, 141.
 American Express Co. v. Haise, 108.
 American Tract Society v. Atwater, 396.
 American Tract Society v. De Witt, 490.
 Ammais' Appeal, 262.
 Anderson v. Anderson, 323.
 Andrews v. Brumfield, 74.
 Andrews v. Hobson, 210.
 Andrews v. Partington, 480.
 Andrews v. Spurlin, 312.
 Appeal of Gable, 283.
 Areson v. Areson, 266.
 Armory v. Meredith, 78.
 Armstrong v. Armstrong, 226.
 Ash v. Abdy, 138.
 Astor's Estate, 244, 835.
 Atkins v. Albree, 327.
 Atkinson v. Hutchinson, 425.
 Attorney-General v. Baliol College, 368.
 Attorney-General v. Baxter, 408.
 Attorney-General v. Calvert, 485.
 Attorney-General v. City of Dublin, 303, 490.
 Attorney-General v. Fishmongers' Co. 408.
 Attorney-General v. Glasgow College, 368, 485.
 Attorney-General v. Gleg, 591. </p> | <p> Attorney-General v. Guise, 368.
 Attorney-General v. Haberdashers' Co. 3.
 Attorney-General v. Hall, 422, 423.
 Attorney-General v. Lonsdale, 368.
 Augustus v. Seabolt, 184, 185.
 Austin v. Munro, 158.
 Avery v. Chappel, 39.
 Avery v. Pixley, 148.
 Ayer v. Ayer, 566.

 Bailey v. Taylor, 126.
 Bains v. Ottey, 266.
 Ball v. Harris, 91, 580.
 Ballard v. Ballard, 266.
 Bancroft v. Ives, 33, 34, 35.
 Bangs v. Smith, 74.
 Bank v. Dalton, 348.
 Banks v. Haskie, 588.
 Banks v. Phelan, 15.
 Barford v. Street, 70.
 Barlow v. Scott, 82.
 Barnes v. Mott, 585.
 Barnes v. Syester, 228.
 Barnes v. Underwood, 470, 473, 474.
 Barney v. Newcomb, 82.
 Barney v. Parsons, 114, 117.
 Barney v. Saunders, 253.
 Barrett v. Marsh, 55.
 Barry v. Butlin, 460, 461.
 Barton v. Collier, 453.
 Bassett v. Miller, 243.
 Batchelder v. Batchelder, 340.
 Bates v. Bates, 243, 279.
 Bates v. Holman, 148.
 Bates v. Mackinley, 356.
 Beachcroft v. Broome, 426.
 Beall v. Holmes, 191.
 Bean v. Myers, 566.
 Beaver v. Filson, 396.
 Beekman v. Bonsor, 403.
 Belchier, Ex parte, 250. </p> |
|---|---|

- Bell v. Fothergill, 30.
 Bellows v. Sowles, 533.
 Bender v. Dietrick, 266.
 Bennett v. Austin, 205.
 Bennett v. Overing, 599.
 Benson v. Benson, 29.
 Bergen v. Bennett, 499.
 Bernard v. Minshull, 55, 278.
 Bestock v. Floyer, 110.
 Bethell v. Moore, 31.
 Bibb v. Thomas, 361, 364.
 Biddle's Appeal, 55, 328, 356.
 Bigelow v. Gillott, 22, 30, 31.
 Bigge v. Bigge, 140.
 Billar v. Loundes, 55.
 Birmingham v. Kirwin, 339.
 Bishop v. Davenport, 437, 440.
 Bishop v. Remple, 75.
 Blackstone v. Blackstone, 558.
 Blagge v. Miles, 71, 72.
 Blaisdell v. Hight, 101.
 Blake v. Pegram, 335.
 Blanchard v. Blanchard, 362.
 Bland v. Lamb, 15, 278.
 Bloomer v. Waldron, 88, 90, 568,
 570, 578, 581.
 Blosser v. Harshbarger, 459.
 Bodman v. American Tract Society,
 495.
 Bogardus v. Clarke, 465.
 Bogert v. Hertell, 153.
 Bond's Appeal, 266.
 Bond v. Seawell, 132.
 Boofter v. Rogers, 222.
 Boraston's Case, 318.
 Bostick v. Bloder, 454.
 Bothamly v. Sherson, 559, 561.
 Boughton v. Flint, 481, 482.
 Bowers v. Bowers, 242.
 Bowker v. Pierce, 371.
 Bowlin v. Furman, 163.
 Boyd v. Blankman, 211.
 Boylan v. Meeker, 146.
 Bradhurst v. Bradhurst, 424.
 Bradley v. Poole, 32.
 Bradley v. Westcott, 420.
 Bradshaw v. Melling, 551.
 Bradstreet v. Everson, 108.
 Brander v. Brander, 540.
 Branson v. Hill, 266.
 Brasfield v. French, 119.
 Brattle Square Church v. Grant, 318.
 Breathill v. Whittaker, 148, 431.
 Brewster v. McCall's Devises, 168,
 490.
 Bridenbaker v. Lowell, 85.
 Bridge v. Abbott, 266.
 Brooks v. Evetts, 312.
 Brooks v. Jackson, 601.
 Brown v. Bartlett, 4.
 Brown v. Clark, 536.
 Brown v. French, 372.
 Brown v. Gellatly, 378.
 Brown v. Harmon, 505.
 Brown v. Hodgdon, 343.
 Brown v. Kelsey, 396.
 Brown v. Knapp, 230.
 Brown v. Merrill, 274, 510.
 Brown v. Peck, 453.
 Brown v. Stewart, 244.
 Brown v. Weaver, 212.
 Brown v. Yeall, 368.
 Browne v. Davis, 262.
 Brown's Will, 30.
 Bruce v. Bonney, 585.
 Bryan v. Howland, 55.
 Buckle v. Bristow, 45.
 Buckley v. Gerard, 35.
 Buckley v. Reed, 178.
 Bull v. Bull, 169.
 Bull v. Kingston, 425.
 Burbank v. Whitney, 370.
 Burch v. Burch, 230, 232.
 Burchett v. Durdant, 321.
 Burleigh v. Clough, 271, 566.
 Burnet v. Burnet, 267.
 Burney v. Spear, 336.
 Burt v. Herron's Ex'rs, 340.
 Burtenshaw v. Gilbert, 140.
 Burton v. White, 189.
 Burt's Case, 243.
 Burwell's Executors v. Anderson,
 566.
 Butcher v. Kemp, 339.
 Butler v. Duncomb, 568.
 Butler v. Dunscomb, 580.
 Butler v. Huestis, 74, 91.
 Butterfield v. Trittipso, 257.
 Button v. American Tract Society,
 490.
 Byers v. Hoppe, 56.
 Byng v. Lord Stafford, 414.
 Calhoun's Estate, 119.
 Cambridge v. Rous, 277, 278.
 Campbell v. Beaumont, 419.
 Campbell v. Johnson, 75.
 Campbell v. Walker, 212, 499.
 Cann v. Fiddler, 229.
 Carne v. Long, 276.

- Carpenter v. Miller's Ex'rs, 148.
 Carroll v. Bosley, 593.
 Carroll v. Carroll, 463.
 Carson v. Carson, 340.
 Case v. Carroll, 205.
 Castle v. Fox, 561.
 Castner's Appeal, 293.
 Castor v. Jones, 226, 229.
 Cave v. Cave, 260.
 Chaffee v. Baptist Missionary, 444,
 445.
 Chamberlain v. Chamberlain, 12.
 Chamberlain v. Stearns, 2.
 Chambers v. McDaniel, 132.
 Chambers v. Queen's Proctor, 449.
 Chandler v. Rider, 598.
 Chapin v. Marvin, 454, 506.
 Chapin v. Weed, 499.
 Chapline v. Moore, 119.
 Chapman v. Comings, 210.
 Charter v. Charter, 485.
 Chase v. Peck, 585.
 Cheatham v. Hatcher, 458.
 Cheese v. Lovejoy, 140, 141, 142.
 Cheesebrough v. Millard, 585.
 Choate v. Arrington, 601.
 Christmas v. Winyates, 29.
 Christie v. Phyfe, 161.
 Christy v. McBride, 112, 119.
 Church v. Crocker, 83.
 Church Extension, &c. v. Smith,
 296.
 Church v. Marine Ins. Co. 210.
 Churchill v. Churchill, 283.
 Churchill v. Hobson, 119, 250.
 City v. Lamson, 506.
 Clark v. Blackington, 210.
 Clark v. Clark, 199.
 Clark v. Constantine, 243.
 Clark v. Middlesworth, 70, 72.
 Clark v. Scott, 178.
 Clark v. Smith, 81.
 Clarke v. Barnes, 585.
 Clarke v. Leupp, 55.
 Clarke v. Scripps, 140.
 Clark's Will, 30.
 Clayton v. Blough, 249.
 Clayton v. Gresham, 540.
 Clayton v. Liverman, 432.
 Cleaver v. Cleaver, 180, 181.
 Cleland v. Waters, 189.
 Clingan v. Mitcheltree, 140, 362.
 Clough v. Bond, 118, 119.
 Clyde v. Simpson, 231.
 Cockburn v. Peel, 878.
 Cockrill v. Armstrong, 55.
 Cocks v. Manners, 408.
 Cogbill v. Cogbill, 30, 31.
 Cogswell v. Cogswell, 356.
 Cole v. Lake Co. 4.
 Cole v. Scott, 563.
 Coleman v. Hutchinson, 524.
 Coleman v. Smith, 593.
 Colgate's Ex'r v. Colgate, 499.
 Collier v. Slaughter, 453.
 Collins v. Carman, 343.
 Collins v. Hoxie, 283.
 Colvin v. Warford, 148.
 Com. of Lagrange Co. v. Rogers,
 306.
 Commonwealth v. Stauffer, 454.
 Comstock v. Hadlyne Society, 39.
 Conger v. Ring, 499.
 Conkey v. Dickinson, 592.
 Conrad v. Long, 267, 452.
 Converse v. Wales, 35.
 Cook v. Collingbridge, 210.
 Cook v. Cook, 551.
 Cook v. Ryan, 199.
 Cook v. Walker, 421.
 Cooke v. Meeker, 16, 433.
 Coon v. Bean, 505.
 Cooper v. Bockett, 29.
 Coppage v. Alexander, 506.
 Cornell v. Lovett, 454.
 Cornwell v. Decker, 251.
 Cotton v. Cotton, 266.
 Coulthurst v. Carter, 266.
 Coutant v. Servoss, 88, 581.
 Cowdin v. Perry, 370.
 Cowley v. Knapp, 226.
 Coyle's Appeal, 551.
 Crane v. Morris, 71.
 Cresson's Appeal, 368.
 Cresswell v. Jones, 55.
 Cresswell v. Lanson, 184.
 Crichton v. Grierson, 3.
 Crispell v. Dubois, 460, 461.
 Crocker v. Dillon, 593.
 Cromer v. Pinckney, 233.
 Crosby v. Mason, 132.
 Cross v. Richardson, 531.
 Cunningham v. Blake, 570.
 Cunningham v. Cunningham, 243.
 Currihan's Case, 243.
 Cutter v. Doughty, 233.
 Daggett v. White, 592.
 Daniel v. Hill, 461.
 Danish v. Disbrow, 85, 87.

- Darbison v. Beaumont, 322.
 Darke v. Martyn, 253.
 D'Arusement v. Jones, 285, 291.
 Dashiell v. Att'y-Gen'l, 296.
 Daughtrey v. Knolle, 83.
 Davenport v. Hanbury, 551.
 Davies v. Baily, 181.
 Davis v. Clark, 443.
 Davis v. Grater, 257.
 Davis v. Ney, 402.
 Davis v. Richardson, 422, 566.
 Davis v. Sigourney, 30.
 Davoue v. Fanning, 204, 499.
 Day v. Floyd, 463.
 Day v. Roth, 401.
 De Bruler v. Ferguson, 396.
 De Caters v. De Chaumont, 499.
 Delafield v. Parrish, 148.
 Demarest v. Wynkoop, 343.
 Denn v. Gaskin, 163.
 Denson v. Mitchell, 566.
 Denysen v. Mostert, 432.
 Devaynes v. Robinson, 570.
 Devecmon v. Devecmon, 224.
 Dew v. Barns, 186.
 Dickinson v. Lee, 283.
 Dickson, *Ex parte*, 295.
 Dickson's Trust, 303.
 Diez's Will, 431.
 Dixon's Appeal, 31.
 Dodd v. Winship, 371.
 Dodge v. Cole, 290.
 Dodge v. Manning, 230, 231.
 Dodge v. Williams, 348.
 Dodge's Appeal, 190.
 Doe v. Allen, 191.
 Doe v. Dring, 266.
 Doe v. Ewart, 378.
 Doe v. Freeman, 105.
 Doe v. Gallini, 313.
 Doe v. Glover, 426.
 Doe v. Harris, 140, 147, 361, 362.
 Doe v. Jackman, 312.
 Doe v. Palmer, 364.
 Doe v. Perkes, 147.
 Doe v. Strickland, 124.
 Doe v. Wilkinson, 266.
 Doebler's Appeal, 314.
 Dole v. Johnson, 340.
 Donney v. Murphy, 461.
 Door v. Gray, 100.
 Dorr v. Tremont Nat'l Bank, 32.
 Dorr v. Wainwright, 340, 582.
 Douglass v. Douglass, 559.
 Douglass v. Satterlee, 153.
 Doyal v. Smith, 506.
 Drake v. Price, 330.
 Drummond v. Att'y-Gen'l, 485.
 Drury v. Natick, 594, 595.
 Drusadon v. Wilde, 74.
 Dumey v. Schœffler, 454.
 Dunham v. Averill, 88.
 Dunlap v. Dunlap, 524.
 Dunnam v. Averill, 490.
 Dunning v. Vandeusen, 72.
 Duval's Appeal, 87.
 Dwight v. Blackmar, 210.
 Eames v. Hicks, 111.
 Earl of Essex's Case, 132.
 Eaves v. Hickson, 119.
 Eberts v. Eberts, 267.
 Eby's Appeal, 178, 179, 358.
 Eddy v. Hartshorne, 55, 56.
 Eddy's Case, 457.
 Edmondson v. Edmondson, 277.
 Edwards v. Hammond, 318.
 Edwards v. Symons, 266.
 Eq. Rev. Int. Soc. v. Fuller, 378.
 Eichelberger v. Barnitz, 550.
 Elling v. Naglee, 336.
 Elms v. Elms, 140.
 Elwood v. Deifendorf, 230, 233.
 Emerson v. Slater, 531.
 English v. Murray, 463.
 Erickson v. Willard, 1, 52, 340.
 Esty v. Clark, 180, 266.
 Evan's Appeal, 140, 143, 145.
 Evans v. Jones, 279.
 Evans v. Smith, 432.
 Everett v. Everett, 561.
 Ewen v. Bannerman, 3.
 Ewing v. Handley, 283.
 Executors of Crossland v. **Murdock**,
 465.
Ex parte Belchier, 119.
Ex parte Bennett, 211.
Ex parte Day, 431.
Ex parte Rigley, 119.
 Fairman's Appeal, 276.
 Farenell v. Steen, 118.
 Farish v. Cook, 101.
 Farmer v. Dean, 499.
 Farwell v. Tweddle, 376.
 Faucett v. Faucett, 499.
 Feit v. Vanatta, 283.
 Fellows v. Miner, 171.
 Ferrin v. Myrick, 153.
 Ferry v. Laible, 87, 88, 570, 581.

- First Universalist Society v. Fitch, 396.
 Fisher v. Hill, 266.
 Fisk v. Sarber, 207.
 Flanders v. Clark, 423.
 Flanders v. Flandera, 211, 212.
 Fleet v. Perrins, 470.
 Fleming v. Wilson, 336.
 Flood v. Pragoff, 137, 260, 548.
 Floyd v. Naugle, 108.
 Fluitham's Appeal, 566.
 Flynn v. Davis, 421.
 Foley v. Parry, 340.
 Fontain v. Ravenel, 591.
 Fontaine v. Tyler, 559.
 Foote v. Whitmore, 55.
 Foot v. Emerson, 243.
 Foote v. Saunders, 274.
 Forbes v. McDonald, 240.
 Fosselman v. Elder, 133, 226.
 Fowler v. Garlike, 45.
 Francis v. Grover, 31, 140, 361.
 Franklin v. Armfield, 276.
 Freeman v. Parsley, 551.
 Frey v. Thompson, 453.
 Froneberger v. Lewis, 211, 499.
 Fry v. Smith, 474, 475.
 Fuller v. McEwen, 230.
 Fulton v. Whitney, 205, 499.
 Funk v. Eggleston, 74.
 Gaines v. Chew, 141.
 Gaines v. Fender, 163.
 Gains v. Gaina, 140, 362.
 Galbraith v. McLain, 437.
 Gallatin v. Cunningham, 499.
 Galliday v. Bisset, 336.
 Gallini v. Noble, 100.
 Gans v. Thieme, 584.
 Gardner v. Heyer, 283.
 Garey v. Whittingham, 266.
 Garrison v. Garrison, 561.
 Gay v. Gay, 31, 144, 148, 364.
 Geiger v. Brown, 186.
 Ghost v. Waller, 109.
 Gibbons v. Fairlamb, 178.
 Gibbs v. Rumsey, 45.
 Gibson's Case, 335.
 Gifford v. Thompson, 355.
 Gilbert v. Bartlett, 262.
 Giles v. Little, 453.
 Giles v. Warren, 140, 147.
 Gilman v. McArdle, 474.
 Gimbel v. Stolk, 281.
 Ginder v. Farnum, 132.
 Gittings v. McDermot, 266.
 Goblet v. Beechey, 39.
 Going v. Emery, 396.
 Gonzales v. Barton, 312.
 Goodfellow v. Goodfellow, 389.
 Goodhue v. Clark, 4, 490.
 Goodlad v. Burnett, 560.
 Goodtitle v. Whitby, 318.
 Goodwin v. Hardy, 354.
 Goods of Birt, 134.
 Goods of Coleman, 362.
 Goods of Gullan, 362.
 Goods of Harris, 362.
 Goods of Horsford, 30, 363.
 Goods of McCabe, 30.
 Gordon v. Preston, 87, 88.
 Gould v. Mansfield, 432.
 Gove v. Gawen, 449.
 Granger v. Bassett, 370.
 Gray v. Garman, 266.
 Gray v. Pearson, 160.
 Grayson's Case, 459.
 Green v. Hanberry, 119, 120.
 Green v. Millbank, 585.
 Green v. Sergeant, 212.
 Greenough v. Welles, 598.
 Greenwell v. Greenwell, 480.
 Griffith v. Frazier, 79, 285, 288.
 Grimes v. Harmon, 43.
 Guerro v. Ballerino, 211.
 Gugel v. Vollmer, 148.
 Guider v. Newsom, 454.
 Gulliver v. Vaux, 426, 427.
 Grimson v. Downing, 323.
 Guthrie's Appeal, 313, 314.
 Habergam v. Vincent, 129, 132.
 Habershon v. Vardin, 368.
 Haddon v. Lundy, 150.
 Hairston v. Hairston, 141.
 Haldenby v. Spofforth, 570, 581.
 Hale v. Marsh, 273.
 Hall v. Cushing, 592.
 Hall v. Hall, 330.
 Hall v. Preble, 74.
 Hall v. Warren, 4.
 Hall's Appeal, 210.
 Hollowell v. Phipps, 283.
 Halstead v. Hall, 283.
 Hanberger v. Root, 129.
 Hanbury v. Kirkland, 110.
 Handley v. Wrightson, 55, 56.
 Hapgood v. Parkin, 111.
 Hardigree v. Mitchum, 507.
 Harding v. Glyn, 55.

- Hardy v. Scales, 337.
 Hargreaves v. Wood, 243.
 Hargroves v. Redd, 146.
 Harkins v. Harkins, 392.
 Harmon v. Brown, 505.
 Harring v. Allen, 314.
 Harrington v. Rich, 531.
 Harris v. Fly, 229.
 Harris v. Jex, 506.
 Harris v. Knapp, 271.
 Harris v. Pue Adm'r, 223.
 Harrison v. Bowe, 316.
 Harrison v. Foreman, 266.
 Harrison v. Harrison, 48.
 Hart v. Burnett, 507.
 Hart v. Tulk, 4.
 Harvard College v. Amory, 370, 374, 540.
 Hatch v. Morris, 585.
 Havemeyer v. Iowa Co. 506.
 Hawkins v. Skeggs, 506.
 Hawley v. James, 119.
 Haydon v. Wilshire, 551.
 Haynes v. Haynes, 81.
 Hays v. Harden, 128, 134.
 Hays v. Jackson, 214.
 Head v. Temple, 90.
 Heard v. Eldredge, 336, 370.
 Heard v. Horton, 320.
 Heath v. Chapman, 408.
 Heavenridge v. Nelson, 344.
 Hepburn v. Skeving, 560.
 Heermans v. Schmaltz, 55, 56.
 Heirs of Blanchard v. Heirs of Blanchard, 140.
 Heise v. Heise, 148.
 Helmer v. Shoemaker, 417.
 Hembling's Case, 535.
 Hemenway v. Hemenway, 328, 356, 378, 380, 381, 382, 383, 384.
 Henderson v. Blackburn, 103, 570.
 Henderson v. Whiting, 235.
 Herring v. Barron, 566.
 Hersley v. Clark, 432.
 Hesketh v. Murphy, 6, 396, 397, 399.
 Hess v. Singler, 50, 55.
 Hill v. Burns, 3.
 Hilliard's Estate, 485.
 Hinton v. Hinton, 343.
 Hiscocks v. Hiscocks, 40.
 Hoare v. Osborne, 276.
 Hobbs v. Knight, 362.
 Hockley v. Mawbey, 551.
 Hoffman v. Ætna Ins. Co. 82.
 Hogan v. Curtin, 453.
 Holcombe v. Lake, 316.
 Holley v. S. G. *et al.* 335.
 Holmes v. Bridgman, 114.
 Holmes v. Godson, 436, 427.
 Holmes v. Mead, 169.
 Holt v. Watt, 180.
 Homberger v. Homberger, 276.
 Hooper v. Hooper, 266.
 Hosack v. Rogers, 335.
 Hough v. Harvey, 336.
 Hough v. Hill, 83.
 Houghton v. Pattee, 4.
 Houser v. Ruffner, 183.
 Howard v. American Peace Society, 266, 490, 496.
 Howard v. Carusi, 56.
 Howard v. Francis, 435.
 Howarth v. Dewell, 55.
 Howe v. Earl of Dartmouth, 114.
 Howland v. Union Theological Seminary, 192.
 Hoyt v. Jaques, 90, 568, 570, 581.
 Hubbard v. Alexander, 124.
 Hubbard v. German Congregation, 80, 88, 581.
 Hull v. Beals, 313.
 Hume v. Richardson, 378.
 Hun v. Cary, 119.
 Hunt v. Hunt, 55.
 Hurlbut v. Durant, 330.
 Huston v. Cook, 283.
 Hyde v. Barrat, 424.
 Hyde v. Hyde, 309.
 Ibbetson v. Beckwith, 163, 191.
 Illinois Land and Loan Co. v. Bonner, 522.
 Ingerson v. Starkweather, 210.
 Inglis v. Sailors' Snug Harbor, 55, 175.
In re Almosnino, 131.
In re Birt, 131.
In re Blundell's Trust, 408.
In re Burkitt, 276.
In re Cadge, 29.
In re Cooke, 143.
In re Countess of Durham, 130.
In re Ebenezer White, 131.
In re European Bank, 151.
In re Fearn's Will, 490.
In re Gullon, 143.
In re Hood, 479.
In re Hutchinson, 55.
In re James, 143.
In re Kellum, 449.

In re Kilvert's Trusts, 490.
In re Lovegrove, 432.
In re Midland R. R. 561.
In re Ord, 561.
In re Penniman's Will, 141, 147.
In re Raine, 432.
In re Sanderson's Trust, 340.
In re Simpson, 148.
In re Stracey, 432.
In re Stringer, 428.
In re Teapes' Trusts, 73.
In re White, 29.
In re Wilson's Will, 141.
In re Goods of Frazer, 148, 151.
In re Matter of Ross, 448.
Ireland v. Parmenter, 267.
Irwin v. Farrer, 566.
Irwin v. Zane, 183.
Ive v. King, 266.
Ives v. Ashley, 211, 212.
Izard v. Izard, 283.

Jackson v. Ball, 414, 416, 417, 428.
Jack v. Feathereton, 322.
Jackson v. Holloway, 20, 141, 142, 147.
Jackson v. Hoover, 185, 524.
Jackson v. Jackson, 546.
Jackson v. Kniffen, 146, 364.
Jackson v. Phillips, 171, 365, 367, 404.
Jackson v. Robins, 416, 566.
Jackson v. Shaffer, 153.
James v. Allen, 2, 3.
James v. Irving, 279.
James v. James, 14.
James v. Marvin, 307, 308, 309.
Jamieson v. Miller, 257.
Jamagin v. Conway, 277.
Jarvis v. Pond, 266.
Jauncey v. Thorne, 444.
Jeffers v. Radcliff, 466.
Jeffersonville R. R. v. Bowen, 257.
Jenkins v. Hughes, 3.
Jennison v. Hapgood, 601.
Jermain v. Lake Shore & M. S. R.R. 354.
Jesson v. Wright, 813.
Jocelyn v. Nott, 174.
Jochumsen v. Suffolk Savings Bank, 80, 285.
Johnson v. Ballou, 267.
Johnson v. Clarkson, 132.
Johnson v. Johnson, 266.
Johnson v. Newton, 251.
Johnson v. Parmley, 585.

Jones' Case, 385.
Jones v. Bacon, 509.
Jones v. Wood, 72.
Jordan v. Adams, 313, 314.
Joy v. Gilbert, 568.
Jumel v. Jumel, 481, 482.

Kearney v. Denn, 465.
Kearney v. Missionary Society, 476.
Kellogg v. Mix, 187.
Kellogg's Case, 335.
Kenney v. Tucker, 488.
Kenyon v. Sea, 305.
Kerr v. Dougherty, 15.
Kershaw v. Kershaw, 437, 440.
Keteltas v. Keteltas, 180.
Killebrew v. Murphy, 276.
King v. Beck, 313.
King v. Cleaveland, 266.
King v. Mitchell, 55.
King v. Strong, 14.
King v. Woodhull, 15, 278.
Kingsford v. Hood, 32.
Kirke v. Kirke, 141, 147.
Kirkpatrick's Will, 30.
Kitch v. Shoenell, 258.
Knefler v. Shreve, 55, 56.
Knight v. Knight, 2, 45.
Knight v. Lord Plymouth, 119, 250.
Krugh v. Shanks, 459.

Lamberts v. Cooper's Ex'r, 466.
Lampson v. Hobart, 531.
Lancaster v. Dolan, 87, 88.
Langdale v. Briggs, 560.
Langford v. Casgoyne, 114.
Lansing v. Lansing, 330.
Larkins v. Larkins, 20, 27, 31.
Larned v. Burlington, 506.
Lassiter v. Wood, 98.
Laughton v. Aitkins, 141, 142, 309.
Lawrence v. Cook, 55, 56.
Layet v. Gano, 85.
Leake v. Robinson, 163.
Lee v. Brown, 480.
Leggett v. Hunter, 119.
Leigh v. Norbury, 551.
Leighton v. Leighton, 268, 269.
Le Page v. McNamara, 397.
Lessee of Hauer v. Sheetz, 266.
Lester v. Smith, 221.
Letchworth's Appeal, 267.
Lett v. Randall, 10, 11, 13.
Lewis v. Lewis, 141, 142, 144, 145, 343, 444, 455.

- Lewis v. Scofield, 481.
 Lifton v. Moore, 230.
 Lilford v. Keck, 560.
 Lindsay v. Fay, 342.
 Lindsey v. Lindsey, 229, 232.
 Lingart v. Ripley, 454.
 Lloyd v. Lloyd, 276, 454.
 Locke v. James, 140, 141, 147.
 Locker v. Bradley, 266.
 Loebenthal v. Raleigh, 91.
 Lofton v. Moore, 235.
 London v. Ingram, 318.
 Long v. O'Fallan, 260.
 Lord v. Bourne, 180.
 Lord v. Brooks, 356.
 Lord v. Lord, 554.
 Lord Shipbrook v. Lord Hinchinbrook, 114.
 Loring v. Brodie, 570.
 Loring v. Marsh, 396, 591.
 Loring v. Summer, 132.
 Lovell v. Minot, 372, 374, 384.
 Lovell v. Quitman, 31, 144, 364.
 Low v. Harmony, 283.
 Lowell, Appellant, 594, 595.
 Lowrie's Appeal, 336.
 Luce v. Dunham, 180.
 Ludlam's Estate, 558.
 Lungren v. Swartzwelder, 224.
 Lushington v. Onslow, 362.
 Lutten's Appeal, 336.
 Lynch v. Hill, 186.
 Lynch v. Mahoney, 16.
 Lyon v. Lyon, 212.
 Lytle v. Beveridge, 204.
 Mabie v. Bailey, 55, 56.
 Magee v. O'Neill, 305.
 Major v. Herndon, 55.
 Malin v. Keighley, 52.
 Malin v. Malin, 141.
 Mandlebaum v. McDonell, 514.
 Mann v. Lawrence, 33.
 Manning v. Manning, 239.
 March v. Huyter, 431.
 Marsh v. Renton, 591.
 Marshall v. Moore, 119, 120.
 Martin v. Funk, 151.
 Martins v. Gardiner, 147.
 Mason v. Poulson's Adm'r, 223.
 Masters v. Masters, 276.
 Mathes v. Stuart, 4.
 Mathews v. Warner, 138.
 Matter of Bostwick, 479.
 Matter of Carman, 331.
 Matter of De Peyster, 572.
 Matter of Diaz, 406.
 Matter of Gilman, 547.
 Matter of Howe, 585.
 Matter of Schouler, 5, 404.
 Maxwell v. Featherston, 312.
 May v. Joynes, 566.
 McCabe v. Fowler, 252, 258.
 McCauley's Appeal, 566.
 McCauseland's Appeal, 326.
 McCaw v. Blewit, 243.
 McClure v. Miller, 212.
 McCorkle v. State, 249.
 McCoury v. Leek, 186.
 McCray v. Lipp, 312.
 McDonald v. Walgrove, 417.
 McDonogh v. Murdock, 294, 297, 298, 368.
 McGlinsey's Appeal, 276.
 McGuire v. Kerr, 547.
 McKeehan v. Wilson, 187.
 McKim v. Aulbach, 120.
 McLaren v. McMartin, 153.
 McMahon v. Tyng, 32.
 McNulty v. Hurd, 481.
 McPherson v. Cauliff, 79.
 McPherson v. Clark, 21, 147.
 McRae's Adm'r's v. Means, 421.
 McWhorter v. Benson, 574.
 Means v. Moore, 140.
 Melia v. Simmons, 285, 286, 291.
 Mellick v. The Asylum, 276.
 Mellish v. Mellish, 191.
 Mence v. Mence, 143, 361.
 Menges v. Dentler, 506.
 Mercer v. Mackin, 30.
 Miall v. Brain, 339.
 Michoud v. Girod, 499.
 Miles v. Miles, 561.
 Miller v. Beates, 80.
 Miller v. Congdon, 335.
 Miller v. Holt, 226.
 Miller v. Rowan, 3.
 Miller v. Teachout, 396, 542.
 Miller's Appeal, 551.
 Milligan v. Poole, 231.
 Mills v. Banks, 91, 568, 579, 580.
 Mills v. Seward, 323.
 Milton v. Hunter, 260.
 Minor v. Mechanic's Bank of Alexandria, 85.
 Minot v. Paine, 356.
 Minter's Appeal, 266.
 Mitchell v. Mitchell, 295.
 Mollan v. Griffin, 216.

- Moore v. Thomas, 588.
 Moore v. Weaver, 266.
 Morice v. Bishop of Durham, 3, 45, 56.
 Morris v. Watson, 581.
 Morse v. Morse, 4.
 Morse v. Royal, 212.
 Morsell v. Ogden, 225.
 Mosser v. Mosser, 431.
 Moore v. Brooks, 323.
 Moore v. Lyons, 266.
 Mors' Appeal, 356.
 Moss's Appeal, 327.
 Mowatt v. Carow, 288.
 Mühs' Succession, 148.
 Muir v. Berkshire, 234.
 Muir v. Craig, 234.
 Mundy v. Mundy, 140.
 Munn v. Burges, 211.
 Munson v. Berdan, 74.
 Murdock v. Ward, 180.
 Murphy v. Teter, 210.
 Murray v. Blatchford, 153.
 Musselman v. Ashleman, 211, 212.
 Mutual Ben. Life Ins. Co. v. Tisdale, 463.
 Myer's Appeal, 336.
 Nash v. Stearns, 3.
 Nash v. Taylor, 229.
 Needles v. Martin, 296.
 Nelson v. Davis, 312.
 Nelson v. Doe, 421.
 Newcomb v. Williams, 200, 592, 593.
 Newell v. Homer, 30.
 Newton v. Marsden, 66, 454.
 Newton v. Porter, 150.
 Newton v. Seaman's Friend Society, 137.
 Nichols v. Allen, 57, 590.
 Nichols v. Nichols, 231.
 Nightingale v. Goalburn, 368.
 Nodine v. Greenfield, 198.
 Noonan v. Bradley, 82.
 Norcum v. D'Ench, 567.
 Norris v. Beyea, 417.
 Norris v. Harris, 83.
 North v. Martin, 313.
 Nowell v. Roake, 73.
 O'Brien v. Heeney, 319.
 Odell v. Odell, 171.
 Odenwælder v. Schoor, 124.
 O'Harrow v. Whitney, 505, 506.
 Ohio, &c., Company v. Debolt, 506.
 Olcott v. Supervisors, 506.
 Olliffe v. Wells, 55, 57.
 Olmstead v. Keyes, 469.
 O'Neill v. Farr, 124.
 Onions v. Tyrer, 809.
 Orr v. O'Brien, 75, 84, 85.
 Orser v. Orser, 444.
 Osgood v. Lovering, 283.
 Owings v. Gwings, 243.
 Page v. Cooper, 88, 581.
 Page v. Foust, 101.
 Page v. Frazer's Ex'rs, 525.
 Page's Estate, 248.
 Paine v. Barnes, 271, 273.
 Palmer v. Horn, 288.
 Paris v. Paris, 540.
 Parker v. Sears, 592.
 Parsons v. Ely, 437.
 Parsons v. Lyman, 350.
 Parsons v. Winslow, 65, 68, 105, 371, 375.
 Patapsco Guano Co. v. Morrison, 570.
 Patterson v. Birdsall, 585.
 Patterson v. Ellis, 417.
 Patterson v. Hawthorn, 178.
 Patteson v. Ford, 459.
 Peat v. Crane, 114.
 Peay v. Barber, 278.
 Peck v. Cary, 449.
 Peck's Appeal, 148.
 Peebles v. Case, 446.
 Pells v. Brown, 411, 412.
 Pennell v. Deffell, 151.
 Pennock v. Pennock, 566.
 Pennsylvania Ins. Co. v. Austin, 91.
 Penticost v. Ley, 100.
 Perine v. Carey, 297.
 Perjue v. Perjue, 140.
 Perkins v. Mathes, 4.
 Perrin v. Carey, 396.
 Perry v. High, 277.
 Peters v. Siders, 35.
 Phelps v. Robbins, 132.
 Phillips v. Beall, 283.
 Phillips v. Phillips, 114.
 Phipps v. Ackers, 318.
 Pick v. Strong, 464.
 Pickard v. Robson, 276.
 Pickens v. Davis, 148, 310.
 Pickering v. Langdon, 185, 421.
 Pickering v. Shotwell, 396.
 Pickering v. Stamford, 9, 11, 12.
 Piper v. Moulton, 276, 279.
 Plater v. Groome, 222.

- Platner v. Patchin, 61.
 Pomeroy v. Partington, 512.
 Poole v. Poole, 314, 322.
 Pope v. Pope, 2.
 Porter v. Bradley, 411.
 Porter v. Jones, 239.
 Porter v. Porter, 267.
 Porter's Appeal, 179, 358.
 Post v. Mackall, 216.
 Powell v. Evans, 114.
 Power v. Cassidy, 96.
 Prentiss v. Prentiss, 35.
 President v. Drummond, 368.
 Prevost v. Gratz, 207.
 Price v. Anderson, 356.
 Price v. Blackmore, 151.
 Price v. Cults, 336.
 Price v. Estill, 582, 583.
 Price v. Mace, 350.
 Price v. Powell, 140, 143, 362.
 Prince v. Hazelton, 138.
 Prince v. Hine, 480.
 Pringle v. Dunkley, 506.
 Probate Court v. Hazard, 599.
 Proctor v. Pool, 98.
 Pryor v. Coggin, 140.
 Pryor v. Mizner, 262.

 Quarles v. Quarles, 438.
 Quennell v. Turner, 100.
 Quincy v. Rogers, 597.
 Quinn v. Quinn, 31, 147.

 Ragner v. Pearsall, 113.
 Ralston v. Waln, 179.
 Ramsdell v. Ramsdell, 271, 421.
 Ramsdill v. Wentworth, 35.
 Rand v. Hubbell, 356.
 Ransom v. Nichols, 468, 469, 474.
 Rasher v. Rasher, 515.
 Raworth v. Marriott, 460.
 Ray v. Simons, 258.
 Read v. Head, 356.
 Read v. Hodgens, 408.
 Read v. Snell, 316.
 Reagan v. Hadley, 585.
 Re Beavan, 362.
 Re Brewster, 362.
 Re Dyer, 361, 362.
 Re Fary, 361, 362.
 Re Horsford, 361.
 Re Ibbitson, 363.
 Reed v. Head, 540.
 Reed v. King, 585.

 Reese v. Portsmouth Probate Court, 148.
 Reeve v. Att'y-Gen'l, 368.
 Reeves v. Reeves, 277.
 Rehden v. Wesley, 258.
 Reid v. Borland, 309.
 Reid v. Hancock, 186.
 Reynolds v. Kortright, 14.
 Rice v. Society, 4.
 Richardson v. Paige, 103.
 Richmond v. Vanhook, 523.
 Riddle v. Hoffman's Ex'r, 108.
 Riddle v. Roll, 211.
 Riddock v. Cohen, 421.
 Ridgeway v. Lanphear, 313.
 Riggs v. Cragg, 480, 481.
 Right v. Day, 316.
 Right v. Sidebotham, 163.
 Rizer v. Perry, 296.
 Robards v. Wortham, 216.
 Robb v. Irwin, 506.
 Robbins v. Bellas, 83.
 Roberts v. Cooke, 278.
 Robinson v. Millard, 597, 599.
 Robinson v. Sykes, 551.
 Roch v. Emerson, 3.
 Roderigas v. East River Savings Bank, 78, 286.
 Rodgers v. Rodgers, 506.
 Roebuck v. Dean, 266.
 Roe v. Cronkhite, 257.
 Rogers v. Bracken, 83.
 Rombach v. Piedmont & Arlington L. Ins. Co. 453.
 Roney v. Stilts, 559.
 Rood v. Hovey, 267.
 Roome v. Phillips, 318.
 Rose v. Hunsly, 289.
 Ross v. Ross, 425, 551.
 Rowan v. Runnels, 506.
 Rowland v. Witherden, 110.
 Rowth v. Howell, 250.
 Rugg v. Rugg, 444.
 Rumsey v. Durham, 505.
 Runkle v. Gains, 140.
 Runkle v. Gates, 146, 362.
 Rupp v. Eberly, 521, 523.
 Russell v. Chill, 561.
 Russell v. Long, 266.
 Rutherford v. Rutherford, 445.
 Ryder v. Hulse, 468, 474.

 Salisbury v. Petty, 266.
 Saltonstall v. Sanders, 3, 171, 396, 591.

- Sanderson v. White, 167.
 Sandford v. McLean, 584.
 Sanger Bros. v. Heirs of Moody, 87.
 Sargent v. Sargent, 16.
 Saunderson v. Stearns, 340.
 Sawyer v. Smith, 364.
 Sawyer's Appeal, 340.
 Saxton v. Saxton, 561.
 Schooler, Petitioner, 57, 590.
 Schoonmaker v. Sheely, 312.
 Schoonmaker v. Van Wyck, 199.
 Schumaker v. Schmidt, 431.
 Scott v. Fink, 310.
 Scott v. Gorton, 210, 211, 212.
 Scott v. Guernsey, 313.
 Scott v. Perkins, 271.
 Scott v. Tyler, 454.
 Scrope's Case, 73.
 Seamen v. Duryea, 480.
 Sears v. Cunningham, 50.
 Sedgwick v. Stanton, 476.
 Seely v. Hills, 119.
 Sessoms v. Sessoms, 186.
 Setter v. Alvey, 241.
 Sewell v. Slingluff, 225.
 Shaftenbury v. Duchess of Marlborough, 91.
 Shanley v. Baker, 278.
 Sharp v. McBride, 258.
 Shaw v. Ford, 428.
 Shaw v. Hussey, 269.
 Sheetz' Appeal, 263.
 Shelley's Case, 312.
 Sherman v. Newton, 343.
 Shimer v. Mann, 521.
 Shore v. Wilson, 484.
 Short v. Sears, 234.
 Short v. Smith, 81, 147.
 Siceloff v. Redman, 312.
 Simbery v. Mason, 309.
 Simms v. Garrot, 320.
 Simmons v. Rose, 108.
 Simpson v. Welcome, 6.
 Sipperly v. Baucus, 480.
 Sir Edward Clere's Case, 73.
 Sisson v. Shaw, 480.
 Slater v. Dangerfield, 549.
 Small v. Howland, 323.
 Smee v. Bryer, 130.
 Smiley v. Gambill, 140.
 Smith v. Bell, 54, 103, 566.
 Smith v. Drake, 211.
 Smith v. Hurd, 120.
 Smith v. Hutchinson, 163.
 Smith v. Palmer, 266.
 Smith v. Smith, 266.
 Smith v. Van Ostrand, 419.
 Smith v. Westfield Bank, 32.
 Smither v. Smither's Ex'r, 346.
 Snelling v. McIntyre, 585.
 Sorden v. Gatewood, 812.
 Southall v. Taylor, 120.
 Southworth v. Adams, 147.
 Spangler's Appeal, 336.
 Spaulding v. Wakefield, 114, 118.
 Speake v. United States, 126.
 Spencer v. See, 305.
 Spring's Appeal, 119.
 Spinks v. Davis, 243.
 Spooner v. Lovejoy, 50, 866.
 Spurgeon v. Schieble, 501, 502, 505, 506.
 Staats v. Bergen, 205.
 Staines v. Stewart, 146, 364.
 Star Glass Co. v. Morey, 313.
 State v. Hearst, 593.
 Staunton v. Parker, 239.
 Steele v. Price, 30.
 Steifel v. Clark, 87, 91.
 Stephens v. Taprell, 361, 362.
 Stephenson v. Dowson, 559.
 Stephenson v. Stephenson, 276.
 Stephenson v. Superior Court, 285, 291.
 Stevens v. Bayley, 562.
 Stevens' Trusts, 180.
 Stevenson v. Leslie, 574.
 Stevenson's Estate, 335, 336.
 Stewart v. Chambers, 341.
 Stewart v. Lehigh Valley R. R. 207.
 Stilwell v. Carpenter, 481.
 Stilwell v. Knapper, 65, 505, 508, 521.
 Stokes v. Payne, 90, 567, 570.
 Stokes v. Solomons, 4.
 Stone v. Hackett, 402.
 Stopford v. Chaworth, 266.
 Storer v. Wheatley's Ex'rs, 181.
 Stover v. Wood, 585.
 Strickler v. Groves, 128.
 Stringer v. Northwestern M. Life Ins. Co. 258.
 Stroughill v. Anstey, 90, 91, 568, 570, 581.
 Struthers v. Struthers, 561.
 Stuart v. Walker, 263, 269, 274, 509, 566.
 Sugden v. Crossland, 242.
 Sutton v. Crane, 540.
 Sutton v. Sutton, 30.

- Swinfen v. Swinfen, 251.
 Swinton v. Bailey, 19, 27, 31, 140, 143.
 Switzer v. Wilvers, 91, 570.
 Sympson v. Hornsby, 9.
 Taggart v. Murray, 271.
 Taintor v. Clark, 598.
 Tappan v. Deblois, 368.
 Tarrant v. Ware, 443.
 Tate v. McLain, 505.
 Taylor v. Dubois, 533.
 Taylor v. Galloway, 580.
 Taylor v. Horde, 512.
 Tebbs v. Carpenter, 114.
 Templeton v. Bascom, 531, 534.
 Tennant v. Braie, 453.
 Terry v. Foster, 33.
 Terry v. Wiggins, 419.
 Thompson v. Donaldson, 463.
 Thompson v. Egbert, 343.
 Thompson v. Lee Co. 506.
 Thompson v. Ludington, 283.
 Thompson v. Shakespeare, 276.
 Thompson v. Thompson, 368.
 Thompson v. Whitman, 289.
 Thorp v. Owen, 340.
 Tiffany v. Clark, 205.
 Tilghman v. Stewart, 221.
 Tillman v. Davis, 180, 358.
 Tilton v. American Bible Society, 490, 595.
 Tilton v. Tilton, 4.
 Tipton v. La Rose, 323.
 Tisdale v. Connecticut Mut. Life Ins. Co. 466.
 Toebbe v. Williams, 30.
 Toller v. Attwood, 323.
 Toms v. Williams, 267.
 Tonnele v. Hall, 131.
 Torrey v. Bank of New Orleans, 205, 499.
 Towner v. Tooley, 230, 233.
 Treat's Appeal, 170, 171.
 Trinder v. Trinder, 560.
 Trustees of Auburn Seminary v. Calhoun, 443.
 Trustees v. Kellogg, 418.
 Trustees v. Peaslee, 4.
 Trustees v. Zanesville C. & M. Co. 543.
 Tucker v. Seamen's Aid Society, 39, 484, 493, 495.
 Tucker v. Tucker, 482.
 Tudor v. Tudor, 30, 148, 260.
 Tyson v. Blake, 418.
 Tyson v. Latrobe, 88, 587.
 Underwood v. Stevens, 114.
 Upwell v. Halsey, 103.
 Ulrich's Appeal, 313.
 Urmeys's Executor v. Woodin, 542.
 Valentine v. Belden, 199.
 Valentine v. Valentine, 330.
 Vallance v. Bausch, 474.
 Valle v. Obenhouse, 159.
 Van Amee v. Jackson, 55.
 Vance v. Campbell, 506.
 Vanderpoel v. Van Valkenburgh, 479.
 Van Dyke v. Johns, 211.
 Van Epps v. Van Epps, 204.
 Van Meter v. Jones, 243.
 Vannorsdall v. Van Deventer, 320.
 Vardeman v. Lawson, 89.
 Varner's Appeal, 188, 190.
 Varrell v. Wendell, 6.
 Vidal v. Girard, 295, 297.
 Vinton's Appeal, 328, 356.
 Wagstaff v. Lowerre, 573.
 Wagstaff v. Wagstaff, 560.
 Waite v. Littlewood, 378.
 Waldron v. Chasteney, 91.
 Waldron v. McComb, 578.
 Walker v. Walker, 430, 431.
 Walker's Estate, 558.
 Walls v. Anderson R. R. 249.
 Walton v. Walton, 558.
 Ward v. Ford, 331.
 Ward v. Sutton, 283.
 Warden v. Richardson, 598.
 Warner v. Bates, 51, 340, 366.
 Warner v. Beach, 535, 536.
 Warner v. Connecticut Mutual Life Ins. Co. 91.
 Warren v. Webb, 269, 271.
 Washburne v. Downes, 277.
 Washburn v. Sewall, 171.
 Waterman v. Whitney, 146, 364.
 Watson v. James, 91.
 Wayne v. Middleton, 91.
 Wayne, Trustee v. Myddleton, 568.
 Weakley v. Conratt, 234.
 Weems v. Jeams, 225.
 Wells v. Doane, 396.
 Wells v. Slater, 89.
 Wells v. Wells, 30, 148.
 Wells v. Williams, 57.

- Welsh v. Anderson, 343.
 Wendell v. French, 336.
 West v. Shuttleworth, 408.
 Westerfield v. Williams, 284.
 Westervelt v. Gregg, 469.
 Wetherbee v. Potter, 32.
 Whatley v. Hughes, 243.
 Wheeler v. Bent, 30, 147.
 Wheeler v. Smith, 45.
 Wheeler v. Wheeler, 153.
 Wheelock v. Looney, 243.
 Wheelwright v. Depeyster, 289.
 Whelpdale v. Cookson, 212.
 Whicker v. Hume, 3, 368.
 Whipple v. Adams, 366.
 White v. Bullock, 244, 335.
 White v. Casten, 140.
 White v. Fisk, 170, 171.
 White v. Hicks, 74.
 White v. Howard, 167, 168.
 Whitney v. Merchants' Union Ex. Co. 108.
 Wight v. Wallbaum, 290.
 Wikoff's Appeal, 132.
 Wilbar v. Smith, 132.
 Wild v. Brewer, 33.
 Wilde v. Armsby, 29.
 Wilder v. Goss, 33.
 Wilder v. Thayer, 35.
 Wilderman v. M. & C. C. Balto, 296.
 Wilkes v. Harper, 584.
 Wilkins v. Ordway, 4.
 Wilkinson v. Adam, 132.
 Wilkinson v. South, 425.
 Willard v. Ware, 74.
 Williams v. First Presbyterian Society, 543.
 Williams v. Jones, 422.
 Williams v. Seaman, 476.
 Williams v. Woodard, 579.
 Williams v. Woodward, 87, 538.
 Williams v. Williams, 48, 55, 95, 277.
 Williamson v. Field, 193.
 Williamson v. Williamson, 16.
 Willis v. Lowe, 130.
 Willis v. Smyth, 151.
 Will of Hewitt, 548.
 Will of O'Neill, 137, 547, 548.
 Willson v. Brown, 234.
 Wilson v. Fosket, 33, 35.
 Wilson v. Maryland Life Ins. Co. 90, 570.
 Wilson v. Moore, 229.
 Wilson v. Piper, 229.
 Wimberly v. Hurst, 74.
 Wimple v. Fonda, 266.
 Winchester v. Foster, 163.
 Winter v. Winter, 266.
 Wise v. Foote, 260.
 Witman v. Lex, 396.
 Wolf v. Bollinger, 21, 30, 147.
 Womrath v. McCormick, 524.
 Wood v. Cox, 2.
 Wood v. Goodridge, 88, 90, 581.
 Wood v. Seward, 55.
 Wood v. Vandenburg, 276.
 Woodbury v. Shackelford, 342.
 Woodfill v. Patton, 143, 364.
 Wooldridge v. Scott, 582, 584.
 Wooley v. Wooley, 445.
 Worsely v. Johnson, 181.
 Worthy v. Johnson, 211.
 Wren v. Bradley, 453.
 Wren v. Kirton, 119.
 Wright v. Atkins, 2.
 Wright v. Atkyns, 56.
 Wright v. White, 371.
 Wright v. Wright, 147, 362.
 Wyche v. Clapp, 431.
 Wythe v. Thurlston, 551.
 Yates v. Clark, 75.
 Yeap v. Ong, 408.
 Yearnshaw's Appeal, 521, 522.
 Young v. Robertson, 3, 161.
 Young v. Young, 151.
 York v. Brown, 561.
 Youse v. Forman, 30, 149.
 Zane v. Kennedy, 87.
 Zerbe v. Zerbe, 188.
 Zoe v. McCord, 457.

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THE AMERICAN PROBATE REPORTS.

GOODALE *vs.* MOONEY.

[60 New Hampshire, 528.]

CHARITABLE USE.—DISTRIBUTION IN JUDGMENT OF EXECUTORS.

A residuary devise to executors to be distributed by them among "testator's relatives, and for benevolent objects, in such sums as in their judgment shall be for the best," creates a valid charitable use.

BILL for the construction of the will of John Mooney, deceased.

Pike & Parsons, for plaintiffs.

W. T. & H. F. Norris, for defendants.

SMITH, J. The intention of the testator, by the residuary clause in his will, was to create a trust in the plaintiffs. His language is: "I place the remainder of my property in the hands of my executors, to be distributed," &c. His intention, distinctly announced, is, that the remainder of his estate intrusted to them shall be distributed for certain declared purposes. (*Erickson v. Willard*, 1 N. H. 217; 1 Per. Tr. §§ 112-123; 1 Jar. Wills, 385-408.)

Is the trust sufficiently definite to be carried into effect? The rule for determining whether the words of a will create a trust or not, is—first, the words must be imperative; second,

the subject must be certain; and thirdly, the object must be as certain as the subject. (*Wright v. Atkyns*, 1 T. & R. 157; *Wood v. Cox*, 2 Myl. & Cr. 684; *Pope v. Pope*, 10 Sim. 1; *Knight v. Knight*, 3 Beav. 148; 1 Per. Tr. § 114, n.) In this case these conditions are complied with. The words are imperative. The testator places his property in the hands of his executors with directions to distribute the same. The subject is the remainder of his estate, and is certain. The object, so far as his relatives are made the distributees, is certain.

But the principal question is, whether the devise in trust "for benevolent objects" creates a trust for charitable uses. Is the word "benevolent," as used in the residuary clause of the will, synonymous with "charitable?" These words are classed as synonymous, but do not always express the same meaning. Many charitable institutions may properly be called benevolent, but every object of benevolence is not an object of charity. (*James v. Allen*, 3 Mer. 17.) It has been held that the word "benevolent," of itself, without anything in the context to qualify or restrict its ordinary meaning, cannot be deemed charitable in the technical and legal sense (*Chamberlain v. Stearns*, 111 Mass. 267); but it is not necessary to inquire what the law on that point is in this State.

The statute 43 Eliz. c. 4 (A. D. 1601), contains an enumeration of charitable objects, all of which have since been considered charitable; also many other uses not named within the strict letter of the statute, but which come within its spirit. (2 Per. Tr. § 692.) It is said that no bequests are deemed within the authority of chancery, and capable of being established and regulated by a court of chancery, except bequests for those purposes which the statute enumerates as charitable, or which by analogy come within its spirit and intendment. (2 Sto. Eq. Jur. § 1155.) Whether this statute has ever been adopted in this State has not been judicially determined, and for the purposes of this case it is not important to inquire, for courts of equity have original and inherent jurisdiction over charities, independent of the statute. (2 Per. Tr. § 694, and authorities cited.) "A trust, to be valid, must be under the control of a court, and the trust must be of such a nature that

its administration can be reviewed. A trust for charity must, therefore, be governed by some principles that are familiar to the court. These principles have grown up in relation to the words 'charity' and a 'charitable use,' and to descriptions that come within them; but there are no rules that can be applied to mere benevolence, liberality, or generosity, or to any words that give a discretion and power to the trustees to apply the funds to any purpose within the whole range of human action." (2 Per. Tr. § 711.) Whether a more liberal rule prevails in this State we need now inquire.

In the case of a charitable gift above all others, it is often said the construction should be such as will preserve rather than destroy the gift. (*Saltonstall v. Sanders*, 11 Allen, 446, 455; *Whicker v. Hume*, 7 H. L. Cas. 154.) In many of the cases the word "benevolent" has been coupled with "charitable" or some equivalent word, or has been mentioned in connection with such public institutions as to show an intent to make it synonymous with charitable. (*Saltonstall v. Sanders*, 11 Allen, 446; *Roch v. Emerson*, 105 Mass. 431; *Hill v. Burns*, 2 Wils. & Sh. 80; *Crichton v. Grierson*, 3 Bligh's N. R. 424; s. c., 3 Wils. & Sh. 329; *Ewen v. Bannerman*, 2 Dow. & C. 74; s. c. 4 Wils. & Sh. 346; *Miller v. Rowan*, 5 Cl. & F. 99; s. c. 2 Shaw & McL. 866; 2 Per. Tr. § 711, *et seq.*; 1 Jar. Wills, 211-215.) In other cases, where a bequest for "benevolent" purposes contained no qualifying or explanatory words, the bequest has been held void for uncertainty. (*James v. Allen*, 3 Mer. 17; *Morice v. Bishop of Durham*, 9 Ves. 399; s. c. 10 Ves. 522; *Attorney-General v. Haberdashers' Co.* 1 Myl. & K. 420; *Nash v. Morley*, 5 Beav. 177; *Chamberlain v. Stearns*, 111 Mass. 267.) The decisions go upon the ground that the testator intended the word "benevolent" to be understood according to the technical construction which had been put upon it by the courts. But in many of the recent English cases a more reasonable construction in regard to technical language has been adopted. In *Jenkins v. Hughes* (8 H. L. Cas. 571), the court said words of a technical kind are not necessarily to receive a technical meaning. In *Young v. Robertson* (4 Macq. H. L. Cas. 314, 325), it was

said the primary duty of a court, in the interpretation of wills, is to give each word employed, if it can with propriety receive it, the natural and ordinary meaning which it has in the vocabulary of ordinary life, and not to give words employed in that vocabulary an artificial, secondary, or technical meaning. In *Hall v. Warren* (9 H. L. Cas. 420) it is laid down that, in construing the autograph of an illiterate man, the meaning of technical language may be disregarded; but no word which has a clear and definite operation can be struck out. Judge Redfield, in commenting upon these cases, says they "evinced a determination not to allow technical rules of construction to overbear and break down all the better instincts and involuntary sentiments of common sense, and the common experience of mankind, even in the construction of wills, and we hail the omen with no slight gratification." (1 Red. Wills [ed. 1864], 429, n.; *Perkins v. Mathes*, 49 N. H. 107, 110; *Trustees v. Peaslee*, 15 N. H. 319; *Tilton v. Tilton*, 32 N. H. 263; *Goodhue v. Clark*, 37 N. H. 525; *Mathes v. Smart*, 51 N. H. 438, 440; 1 Red. Wills, 426, 442; *Stokes v. Solomons*, 9 Hare, 75; *Hart v. Tulk*, 2 De G., M. & G. 311.)

We are very much inclined to doubt whether the construing of a will according to technical rules does not result quite as often in defeating as in promoting the testator's intent. In this State the intention of the parties to a written instrument is determined, not by any technical rules of construction, but, like a question of fact, by the weight of competent evidence. No technical rules of construction applicable to all cases can be established. The intention in each case is determined by the evidence bearing on the case. (*Cole v. Lake Co.* 54 N. H. 242; *Rice v. Society*, 56 N. H. 191, 197; *Houghton v. Pattee*, 58 N. H. 326; *Morse v. Morse*, 58 N. H. 391; *Brown v. Bartlett*, 58 N. H. 511; *Wilkins v. Ordway*, 59 N. H. 378.)

In this case, there is nothing in the thirty-fourth clause of the will which indicates that the testator did not intend by the word "benevolent," objects which are technically known as "charitable." The clause reads: "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease among my relatives, and for benevo-

lent objects, in such sums as in their judgment shall be for the best. In case the first named executor, John H. Goodale, shall find himself in need of means, he can take from the residue above named the sum of three thousand dollars." It may be said that it is quite probable the testator did not know there is any legal difference between the words "charitable" and "benevolent." Most persons probably use the words indifferently and as meaning the same thing. If it had occurred to the testator to look in the dictionary, he would have found the words classed as synonymous. (See Web. Dic. "charitable," "charity.") In its popular sense, by a benevolent person is understood one who emphasizes his good wishes by well-doing.

Looking to the testator's circumstances and the rest of the will for light, it appears that he died leaving no lineal heirs or widow; that he devised to various charitable and religious institutions, and to many of his heirs at law, and to heirs of his deceased wife, legacies in money to the amount of \$38,200; also, that he made specific legacies of personal property, and specifically devised his real estate. The amount to be distributed under the clause in question is about \$25,000. In disposing of this estate, amounting probably to \$75,000, the disposition made of his estate in other parts of his will furnishes some evidence of what was his intent in the residuary clause. He bequeathed to the Tilton and Northfield Congregational Society, \$1,000; to the New Hampshire Home Missionary Society, \$2,000; to the New Hampshire Bible Society, \$500; to the Foreign Missionary Society, \$500; to the New Hampshire Ministers' Widows' Society, \$1,000; to the New Hampshire Conference Seminary at Tilton, \$500—total, \$5,500—all of which must be regarded as charitable objects. The balance of the sum of \$38,200 is bequeathed mostly to relatives by blood or marriage. Some small sums, in the aggregate not large, are given to persons not denominated in the will as relatives—as, for example, \$300 to Mrs. Ruth Cox, of Holderness, a woman then upwards of one hundred years of age, the apparent object of the bequest being for her relief and comfort in her extreme old age, and hence within the line of charitable gifts. His intent, as thus disclosed, appears to have been to distribute his property

to his relatives and for charitable objects; and we think it is a fair construction of the residuary clause, to hold that the trustees might distribute the remainder of his estate to such relatives within the statute of distribution (*Varrell v. Wendell*, 20 N. H. 181) as are needy, and to such charitable objects as he gave specific legacies to. The use of the word "relatives" excludes all others as individuals. In authorizing his executors to dispose of the remainder to the distributees in such sums as in their judgment shall be best, he evidently had in view the necessities of his relatives, as well as the comparative claims for benevolent support of charitable institutions. The coupling of the provision in the same clause, that his son-in-law might take \$3,000 of the residue in case of need, gives additional strength to this construction. The use of the conjunction "and" in the clause "among my relatives and for benevolent objects," shows that the testator did not intend to give this large sum wholly to his relatives nor wholly to charitable institutions, but to both objects in such sums as the executors should judge best.

On the question whether a bequest for a benevolent purpose, not charitable in the technical sense, would be void, we express no opinion.

The question whether parol evidence is admissible for any purpose in giving construction to the will, will be considered when such evidence is produced.

Case discharged.

STANLEY, J., did not sit: the others concurred.

See *Simpson v. Welcome*, 2 Am. Prob. R. 248; *Nichols v. Allen*, Ib. 369; *Hesketh v. Murphy*, 8 Id. 7; *Matter of Schouler*, Ib. 249; *Fairfield v. Lanson*, *infra*; *Quinn v. Shields*, *infra*; *Pritchard v. Thompson*, *infra*.

MATTER OF BENSON.

[96 New York, 499.]

EFFECT OF ACCEPTANCE OF PROVISION IN LIEU OF DOWER.

The acceptance of a provision in a will in lieu of dower bars a widow from any share in lapsed legacies.

APPEAL from a judgment of the Supreme Court affirming a decree of the surrogate on the final accounting of the executors of the will of John Bullard, deceased.

B. F. Tracy, for appellants.

Jasper W. Gilbert, *Benjamin D. Silliman*, and *Thomas H. Rodman*, for respondents.

EARL, J. John Bullard died in January, 1881, leaving a will dated February 4, 1876, and leaving a widow and next of kin, but no children. He devised to his wife, Jane E. Bullard, a valuable house in Brooklyn, and bequeathed to her household furniture, paintings, books, horses and carriages and \$150,000 in money, which sum he directed his executors to pay within three years after his death at such times and in such amounts as they in their discretion should think proper, and until full payment to pay her semi-annual interest upon the sum unpaid to her, computed from the time of his death. He also directed that such legacy to his wife should take precedence in payment over all the other legacies given in his will; and he gave various other legacies, among which was a legacy of \$25,000 to his brother William, and one of \$2,000 to his cousin Ann Eliza Garnet. The residue of his estate he disposed of as follows: Two-fifths thereof to his brother William, one-fifth thereof to each of his nephews, John R. and Lewis H. Bullard, and the remaining fifth thereof to his executors, upon trust to invest the same and receive and pay the income thereof to his wife during her life, and after her death to pay the principal thereof

to his brother William and the two nephews, John R. and Lewis H., in equal shares. After the devises and bequests contained in the will, there was the following provision in the twenty-fourth paragraph thereof: "It is my will, and I do hereby declare that the devises and bequests hereinbefore made, to and for the benefit of my beloved wife, Jane E. Bullard, are made and shall be accepted and received by her, in lieu and bar of her dower, and of all claims she may have upon or against my estate as my widow."

William Bullard and Ann Eliza Garnet both died before the testator, and it is conceded by all parties that the legacies to them lapsed, and that the share of William Bullard in the residue lapsed, and that as to such share the testator died intestate.

The widow accepted the provisions made for her in the will, but notwithstanding this her executors, the appellants, claim that they as such are entitled to one-half of the lapsed legacies under the statute of distributions; and the executors of the husband, the respondents, claim that, by accepting the provisions made for her in the will, she was, under the twenty-fourth paragraph thereof, barred of any further share in the estate; and so it has been held by the surrogate and Supreme Court.

The claim of the appellants is that the provision barring the widow was inserted in the will for the benefit of the other devisees and legatees, and that no one but such devisees and legatees can set up the bar against her. The claim of the respondents is that the bar was inserted in the will for the benefit of the other devisees and legatees not only, but in case of the testator's estate, the provision for the widow, in the mind of the testator, being sufficient and all she was to have out of his estate.

The learned counsel for the appellants, to support his contention, cites 2 Williams on Executors, 1063; 2 Jarman on Wills (5th Am. ed.), 35, 36; 2 Redfield on Wills, 747, 748, §§ 19, 20; and these text-writers sustain him. They all lay down the rule substantially that a gift to a widow, in satisfaction of all claims on the testator's estate, does not preclude her

from claiming her share in the personalty under the statute of distributions in the event of a failure of a bequest of that property; and they cite for the rule the case of *Pickering v. Stamford* (2 Ves. 272, 581; 3 id. 332, 492). In that case a testator gave certain parts of his real and personal estate to his wife, declaring that the provision thus made for her was and should be in bar and full satisfaction of all dower or thirds which she could have or claim "in, out of, or to all or any part of his real and personal estate, or either of them." Then after certain bequests to his next of kin, he gave the residue of his estate to his executors upon certain charitable trusts; and such gift of the residue was held to be illegal, so that the testator, as to the residue, actually died intestate. The master of the rolls at first (2 Ves. 581) held that the widow was barred by the provisions made for her of all interest in the estate of her husband. But subsequently, his attention having been called to the case of *Sympton v. Hornsby*, decided by Lord Cowper as chancellor, he reversed his former decision on the authority of that case, and held that the widow was not barred (3 Ves. 332), and his decision was affirmed by the chancellor. (3 Ves. 492.)

We are not satisfied with the reasoning upon which the decision in *Pickering v. Stamford* rests. It is difficult to understand the opinion of the chancellor. He held that he was bound to close the will and could not look at it. It was easy to reach the conclusion that the statute of distributions must control if the will was wholly ignored. It cannot in such a case be ignored. It must be looked at and its language must be construed for the purpose of arriving at the intention of the testator. What did the testator mean in this case? He made an apparently liberal provision for his wife, and then declared that it should be in lien and bar of her dower and of all claims she might have upon or against his estate as widow. What reason is there for saying that the bar was intended for the benefit of the other devisees and legatees named in the will? None that I can perceive. If he had meant that and no more, language expressing just that could have been used. On the contrary he used the most comprehensive language "all claims" she may have upon or against his estate as widow. He clearly

had in mind his whole estate. He had made for her what he deemed a suitable provision in view of all the circumstances—all she should have out of his estate, and then provided that she should have no more. It is mere guess-work to suppose that if he had known that the two legatees would die before him, he would have made a more ample provision for his wife. The just inference is that he gave his wife all he intended under any circumstances she should have. If the bar was to operate to exclude the widow as to the personal estate, only in case the bequests became operative, then it was unnecessary, as the bequests would carry that estate away from her in spite of anything she could do or any claim she could make. According to the contention of the appellants, the bar was to be inoperative in the only case, to wit, that of lapsed legacies, in which it could be useful or have any effect.

It is conceded that if such provisions are made in lieu of dower it will bar the widow, not only of all claim in the real estate owned by the testator at the date of his will, but in all the real estate afterward acquired by him. So, too, if a testator makes a provision for his wife in lieu of dower and then devises his real estate away from his heirs by a devise which lapses by the death of the devisee in the lifetime of the testator, or which for any other reason becomes void and inoperative so that the real estate descends to the heirs of the testator, can it be doubted that the widow would, by accepting the provisions made for her, be barred of dower in the real estate? It could not be said that the provision in such case was made for the benefit of the devisee, but it would be held to have been made in ease of the real estate to whomsoever it might go. It is impossible for me to perceive why the same rule should not operate in the exclusion of the widow from any share in lapsed legacies of personal estate. If it cannot be said in the one case that the provision was made for the benefit of the devisee, how can it be said in the other case that it was made for the benefit of the legatees? If the heir in the one case can set up the bar, why may not the next of kin in the other case?

It is conceded upon the authority of the case of *Lett v.*

Randall (3 Smale & Gif. 83), and by the text-writers above referred to, that if in this case the testator had left a portion of his personal estate undisposed of, or if, upon the face of the will he had died intestate as to a portion of his personal estate, his widow would have been barred of any claim as widow in such portion. That concession goes far enough in principle to sustain the bar of the widow in this case. The two legatees had died in the lifetime of the testator, and as they resided near him and were nearly related to him he must be presumed to have known it, and he must, therefore, have known that the legacies to them had lapsed. The will spoke at his death and then first took effect. It must be treated as if the testator had made no disposition of the portions bequeathed to the two legatees, and as if he had intentionally died intestate as to such portions; and thus the principle laid down by the text-writers and decided in *Lett v. Randall* is applicable to this case. This may be treated as a case of intestacy on the face of the will. Legacies to persons having no being are as no legacies. It cannot be said that the provisions for the wife were made for the benefit of legatees not in existence.

The distinction attempted to be made between the case of *Pickering v. Stamford* and the case of *Lett v. Randall*, and the reasoning upon which it is attempted to sustain the former decision, are so artificial, obscure and illogical that they do not receive the sanction of our judgment. Giving the ordinary force to the language used in paragraph 24, ascribing to it the meaning which we think such language under such circumstances is always intended to have, we can entertain no doubt that the testator intended to bar his wife of any further share, under any circumstances, in his estate.

If in this case the widow had, prior to her marriage, entered into an ante-nuptial agreement with her husband by which, in consideration of provisions then made for her, she had consented to take and claim no more in his real or personal estate, it is conceded that such contract would have bound her, and after the death of her husband, barred her from any further share or interest in his estate. By accepting the provisions made for her in the will, in lieu of all her rights as widow in the estate

of her husband, she assented to all the terms and conditions annexed to the provisions and becomes bound by them just as if she had covenanted to observe them, and her assent can be enforced in equity just as if she had come under a convention or contract. We can perceive no reason for enforcing such a covenant, made before the marriage, that does not exist for enforcing the assent, the legal equivalent of a covenant, given after the dissolution of the marriage by death.

The case of *Pickering v. Stamford* has never been followed in this State, and its authority was repudiated by the case of *Chamberlain v. Chamberlain* (43 N. Y. 424). In that case the testator made provision for his widow, and declared that if she accepted such provision she should not be entitled to dower in the property of the testator or to receive any other share or interest in his estate. Before the proof of the will the widow executed a paper declaring her election to accept the provision made for her by the will, and releasing the estate, and every part thereof, and the executors, heirs at law and next of kin of and from all interest, claim, right, dower and distributive share in and to the estate and every part thereof. Subsequently some of the provisions contained in the will were held to be invalid, so that the testator died intestate as to a portion of his property. The widow claimed, notwithstanding the provision made for her and her acceptance thereof, her share as widow in the property not legally disposed of by the will, and as to which there was a legal intestacy; and the case of *Pickering v. Stamford* was cited to sustain her claim, but it was denied and held that her acceptance of the provision made for her barred her of any further interest in the estate left by the testator. Allen, J., writing the opinion, said: "This condition and limitation was imposed, not for the benefit of the other legatees under the will, but as a just limitation to the claims of the widow upon the estate. It is a testamentary declaration that the provision made for the widow was just and reasonable in view of her age, condition in life and prospective wants, and the amount and value of his estate, and that it ought not to be increased in any contingency." The case of *Pickering v. Stamford* cannot stand with that case. In both cases there

was a legal, as distinguished from an intentional intestacy, and in both the language barring the widow was substantially the same; and the Chamberlain case is not distinguishable from this. The language barring the widow is substantially the same. In both cases there was an unintentional intestacy; or in this case there was an intentional intestacy, the testator in his lifetime knowing of the death of the two legatees, in which event, on the authority of the case of *Lett v. Randall* and other cases, the widow was barred. None of the authorities, however, cited by the learned counsel for the appellants, make any distinction between a case of intestacy made in consequence of lapsed legacies and a case of intestacy made by legacies held to be illegal and void as in conflict with some rule of law. Both kinds of intestacy are placed upon the same footing as to the rights of the widow. A testator, by mistake or in ignorance of the amount of his property, may fail to dispose of the whole of his estate, and thus die intestate as to a portion thereof, and yet it is conceded that in such case, by such a provision as is contained in this will, the widow is effectually barred. How can it make any difference in principle, as to the rights of the widow in such a case, whether the testator fails to dispose of his whole estate from ignorance of the facts or ignorance of the law? Nor is the Chamberlain case distinguishable from this on account of the release executed by the widow, because it was held that she executed that, supposing it to be a mere election to take under the will, and the case was disposed of in this court without taking the release into consideration, and solely upon the provision made for the widow and her election to accept it. That case, as to the point now involved, was well and carefully considered, and as to it the judges were unanimous; and even if we entertained any doubts as to the soundness of the decision, as it for the first time in this State laid down the rule which is neither unjust nor inconvenient for the construction of such wills as this, we should feel bound to adhere to it as a controlling authority.

So far we agree with the courts below, but there are other features in reference to which we are constrained to differ with those courts. The will of the testator contains an unqualified,

absolutely general residuary clause in these words: "All the rest, residue and remainder of my estate, both real and personal, whatsoever and wheresoever, whereof I shall die seized, possessed or entitled unto, I give, devise and bequeath as follows, to wit:" two-fifths to his brother William, one-fifth to each of his nephews, John R. and Lewis H., and the remaining fifth in trust for his wife during her life, and after her death to his brother and two nephews before named. While the widow did not take any of this residue absolutely, she was interested in having it as large as it could be under the will, because she was entitled to the income of one-fifth thereof during her life. The courts below held that the two lapsed legacies of \$25,000, and \$2,000, did not fall into the residue, but passed as undisposed of to the next of kin. In this they erred. The rule is universal, to which there is no exception to be found in any of the books, that lapsed legacies under such a residuary clause as this fall into the residue, and pass to the residuary legatees. In Roper on Legacies, 496, it is said, that "when the lapse is of a general or specific legacy, or of an annuity, it falls into the general residue, and consequently belongs to the person entitled to that fund by the gift of the testator." In Williams on Executors, 1044, it is said that "when the residuary legatee is nominated generally, he is entitled in that character to whatever may fall into the residue after the making of the will by lapse, invalid dispositions or other accident." In 2 Redfield on Wills, 442, it is said that "it seems to be well settled that a residuary bequest as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee as to personalty against any other person except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee." In *Reynolds v. Kortright* (18 Beav. 417, 427), the learned judge writing the opinion said: "The result is that everything which is ill-given falls into the residue." To the same effect are the following authorities in this State. (*James v. James*, 4 Paige, 115; *King v. Strong*,

9 id. 94; *King v. Woodhull*, 3 Edw. Ch. 79; *Banks v. Phelan*, 4 Barb. 80.) But the testator may, by the terms of the bequest, narrow the title of the residuary legatees, as where it appears to be his intention that the residuary legatee shall have only what remains *after the payment of legacies*; and he may so circumscribe and confine the residue as that the residuary legatee will be a specific legatee, and then he will not be entitled to any benefit accruing from lapses unless what shall have lapsed constitute a part of the particular residue. But, as said by Lord Eldon in *Bland v. Lamb* (2 Jac. & Walk. 406), "very special words are required to take a bequest of the residue out of the general rule." In *Banks v. Phelan*, a learned judge said that the only exception to the general rule is, "when the words used in the will expressly show an intention on the part of the testator to exclude such portions of his estate as are mentioned in any of the previous clauses of the will from falling into the general residue." There is nothing in this will showing that the testator meant to exclude anything from or to circumscribe or limit the residue. The courts below excluded these lapsed legacies from the residue upon the authority of the case of *Kerr v. Dougherty* (79 N. Y. 327). But that case was misconceived. It was there held that there was no general residuary clause; that the testator there meant to limit and circumscribe the residuary clause and used such language as to show that it could not be increased by the lapsed legacies. The general rule, as we have laid it down, was recognized in the prevailing opinion, but it was held that the language of the will then under consideration, and the facts, took that case out of the rule. Therefore one-fifth of these two lapsed legacies should have been added to the residuary estate which was to be held in trust for the widow.

As I understand the decree of the surrogate, in arriving at the residue in which the widow was to share, he excluded all interest which accrued subsequently to the death of the testator, and in this he erred. All interest, otherwise undisposed of, fell into the residue. There were a number of legacies as to which no time of payment was specified, and they were

payable at the end of the year without interest; and there were a number of legacies, in terms payable within three years without interest. The income of the funds set apart, or held for the payment of these legacies, should have been added to the residue.

The Supreme Court did not err in holding that the widow was entitled to the interest on the share of the residue put in trust for her from the death of the testator (*Cooke v. Meeker*, 36 N. Y. 15; *Lynch v. Mahoney*, 2 Redf. Surr. 434; *Williamson v. Williamson*, 6 Paige, 298; *Sargent v. Sargent*, 103 Mass. 299); and hence such interest formed no part of the residue. But the other four-fifths of the residue were not payable until at the end of one year from the death of the testator, and hence the income of those shares for one year, except as to the two-fifths which lapsed, being otherwise undisposed of, went into and formed a part of the residue. To ascertain the amount of a general residue, all the income of the estate, not otherwise disposed of, must be added to the residue. Ordinarily this is not important as to the interest upon the residue, as both principal and interest go to the same parties. But whenever it is important to any one the residue should be thus ascertained. Here it was important to the widow that everything should be added to the residue which belonged there; and hence all the interest for one year, on so much of the residue as did not lapse, excluding her one-fifth, to wit, on two-fifths thereof, should have been added to the residue, so as to make up the true amount from which the one-fifth of principal was to be taken and held in trust for her. It may be difficult to work out all these details, but with the aid of rules referred to in *Williamson v. Williamson*, it will not be found impossible.

We are, therefore, of opinion that the decree of the surrogate and the judgment of the General Term should be modified, and that the case should be remitted to the surrogate for judgment in accordance with this opinion, the costs of the appellants and respondents in this court to be paid out of the estate.

All concur.

Judgment accordingly.

ESCHBACH vs. COLLINS.

[61 Maryland, 478.]

ALTERATION OF WILL BY OBLITERATION.

A testator cannot, by merely striking out words, alter a will so as to enlarge an estate granted. The original language remains operative.

ACTION by the administrators with the will annexed of John Eschbach, for a construction of deceased's will.

A. Leo Knott, for the widow.

Bernard Carter and *Arthur W. Machen*, for judgment creditors.

Richard Bernard, for appellees.

YELLOTT, J. The bill of complaint in this cause invokes a judicial construction of the will of John Eschbach, the meaning of which having been rendered ambiguous, obscure, and, in some places, apparently incomprehensible, by obliterations made by the testator a number of years subsequent to the date of its execution. The will was originally executed in conformity with the requirements of the statute prescribing the formalities to be observed in making a testamentary disposition of real estate. In the first clause, two of the testator's sons, Leo Eschbach and John E. Eschbach, are appointed executors, with the usual directions in regard to funeral expenses and the payment of debts. In the second clause, the whole estate, real and personal, is devised and bequeathed to the said Leo and John E. Eschbach in trust. The testator then proceeds to declare the nature and purposes of the trust thus created, and the mode and manner in which it shall be executed, with a multitude of provisions not necessary to be here recited, as they involve no questions now presented for adjudication. The *corpus* of the estate is to be divided into ten equal parts corresponding

to the number of the testator's children. Leo Eschbach and John E. Eschbach are, each, to take one-tenth, entirely exempted from the operation of the trust, and to be held by them absolutely, or in fee simple. To the other sons, and the daughters, life estates are given with remainders as prescribed by the terms of the will. It becomes important, in the construction of this will, to observe that none of the children of the testator are mentioned by name except Leo and John E. Eschbach. The others are simply designated as sons or daughters.

After the death of the testator the will was discovered with certain words written below the signatures of the attesting witnesses. This writing is somewhat deficient in perspicuity, which is, perhaps, attributable less to the general imperfection of human language than to the peculiarity of the diction employed. It was not there when the will was executed. It has no attestation, but is supposed to be in the handwriting of the testator, and was signed by him. It is in these words:

February 3, '80.

For Good & *soun* Reason, I arrest John E. Eschbach Name, and Leo Eschbach his Name, the above date, in Good Health and Reason. Signed the above date.

JOHN ESCHBACH.

In each clause of the will, wherever the names of Leo Eschbach and John E. Eschbach occur, a pen has been drawn across, leaving the names legible but the writing partially defaced by the attempted obliterations.

Two important changes in the will result from these erasures. The first is the removal of Leo and John E. Eschbach as executors and trustees. No question here arises for the determination of this court; the said Leo and John E. having declined to act as executors, and their formal renunciation being embodied in the record. The Circuit Court has also, in the exercise of its jurisdiction, and in conformity with the provisions of the will, appointed trustees, and Leo and John E. Eschbach have admitted and averred in their answer that said trustees have been duly appointed. But another and more material change has been effected by these erasures. The will, as orig-

inally executed, gave life estates to all the sons except Leo and John E. Eschbach. The erasure of the two names operates to confer estates in fee simple on all the sons. The testator says, in the second clause, "the shares of my sons Leo and John E. Eschbach to be held by each of them, who may survive me, absolutely, and the trust hereby created to cease as respects them, or the one who may survive me. The shares of my other children to be held for their respective lives," &c., &c. The testator had other sons besides the two specially mentioned by name. Omit the words erased and it will be seen, at a glance, that all the sons take absolutely, and the words "my other children" apply only to the daughters. Again, in the concluding portion of this clause the testator says, "it being also my intention to pass life estates to all my children and descendants of a deceased child, who may take at the time of my death, with the exception that my sons, Leo Eschbach and John E. Eschbach, shall each, if he survives me, take absolute fee simple estates in their respective shares." He has erased the names of Leo Eschbach and John E. Eschbach, and this obliteration manifestly creates a fee simple estate in each son, and renders the word "children" applicable only to the daughters.

The first question presented for adjudication is whether a testator can, by the obliteration of certain words in his will, cause the transmutation of a life estate into a fee simple. This is the converse of the proposition presented by the case of *Swinton v. Bailey*, 1 Exch. D. 112. There the effect of the obliteration was to diminish an estate in fee simple and convert it into an estate for life. Chief Baron Kelly, in the Exchequer, held that this could not be done. The judgment of the Exchequer was reversed in the Court of Appeals, Cockburn, Ch. J., saying: "Although it is a devise in fee simple, I think that is (so far as it is matter of revocation) divisible into two parts, and that the man who has given the larger estate may revoke the gift to that extent, and cut it down to the smaller gift or devise of an estate for life. It may be that you cannot add to the will." The decision of the Court of Appeals was affirmed in *House of Lords*, 48 L. J. 57. The only principle determined

in this case was that an estate might be diminished by the erasure of certain words, and any general observations, made by judges, which extended beyond the scope of the question in controversy, could hardly be recognized as establishing a safe precedent even within the jurisdiction where the decisions of that court must be received as authoritative.

In *Larkins et al. v. Larkins et al.* 3 Bos. & Pull. 20, Lord Alvanley, Ch. J., said: "If the remaining devisees were to acquire any estate which *they had not before, something beyond a mere revocation would be necessary.*"

A careful analysis of either of the English or the Maryland statute would seem to lead irresistibly to the conclusion that every testamentary act by which property is transmitted should be authenticated in the manner prescribed by the Legislature. A man may devise the whole of his estate in fee simple. This is one testamentary act. He may subsequently change his intention, and, as the fee is susceptible of subdivision, he may determine to give a less estate. This would certainly be another and a distinct testamentary disposition, and when it is alleged that he has so determined, the adduction of the proper proof is requisite. It is apparent that this proof must be supplied by the production of another will or a codicil properly attested and executed. Hence, it would seem to have formerly been the settled doctrine in England, that "any alteration that amounts to a new devise of the land, requires that the will should be re-executed according to the statute." (*Lovell on Wills*, 349.)

The American cases fully recognize this doctrine, and when an attempt has been made by interlineation or obliteration to make a different disposition of the estate, the attempt has been held to be abortive, and the will operated as originally executed. In *Jackson v. Holloway* (7 Johns. [N.Y.] 395), a testator having made his will, devising his lands then in possession to his four sons, subsequently acquired other lands which, by the statutes of the State, did not pass by a will executed antecedently to the seizin. He attempted an alteration by erasures and interlineations so as to make the devise extend to all the lands of which he should die seized; and indorsed a

memorandum to that effect on the will, stating the alterations which he has made. This memorandum was attested by two witnesses only. It was held that the erasures and interlineations did not destroy the original devise, but that the alterations, not having been attested by three witnesses, could not operate. The court said: "The obliterations in the will were made, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention."

In *McPherson v. Clark* (3 Bradf. 99) the testator attempted to revoke the devise to his daughter by striking out the words "my children" and inserting "my two sons." The court said: "This insertion is inoperative for want of re-execution and attestation; and the intent failing as to the substitution intended, it must fail likewise as to the revocation intended. Enough remains on the face of the will to show that the word erased was 'children,' and the will must be so recorded."

In the case of *Wolf v. Bollinger* (62 Ill. 37-), the testator having devised his estate to one person, afterwards attempted to transfer it to another. The alteration was made by an interlineation which was not attested in the presence of the testator. The court said, that "for want of a compliance with this statutory requirement, the instrument did not operate as a disposing will. The cancellation was not made with intent to revoke the devise to the complainant, simply, but with intent to substitute in her stead the defendant; and the ultimate object of substitution having failed of accomplishment, the cancelling, which was done only in the view of, and in order to effect that object, should be esteemed for nothing, and be considered as not having been made absolutely, but only conditionally, upon the attempted substitution being made effectual. To give it effect under the circumstances, would seem to be to thwart the inten-

tion of the testator, and make him intestate when he manifested a contrary intent by his will."

In the case of *Bigelow v. Gillott* (123 Mass. 102) there was an entire obliteration of the sixth and thirteenth clauses of the will by ink lines drawn through and across every word constituting those clauses. This was held to be a revocation of these two clauses; leaving intact the other clauses of the will. The court said: "He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will." "The argument, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property."

If this was simply a question of revocation, its determination would involve a construction of Sec. 302, of Art. 93, of the Maryland Code of General Laws, which prescribes the mode by which a revocation may be effected. The language of the statute is: "No devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable" except in the manner designated. An entire will can thus be revoked, or any clause thereof. What, then, is a clause? Does it consist of two or three words which, disjoined from the context and transferred to a separate sheet of paper, would be devoid of sense or meaning? Do the mere names of two persons constitute a clause? Is not a clause always understood to mean one of the subdivisions of a written or printed document? Is the word ever used in any other sense? Wills are frequently subdivided into a number of clauses. In one, the testator may provide for the payment of debts; in another, dispose of his personal property; in a third, devise his real estate; in a fourth, leave legacies; and then there may be a residuary clause. It is not apparent that the statute has reference to one of these subdivisions of a will when the word clause is used in connection with revocation? It is true that the whole will might be revoked, or any clause thereof, by obliterating all the words necessary to give it meaning. To de-

prive a will of all meaning would be as effectual a revocation as if it had been consumed to ashes.

It is manifest that in the construction of this will a question is encountered which involves something more than mere revocation. The will has not been revoked; it has been altered. It cannot be supposed that when the Legislature uses the word "revocation" it is to be construed to mean mutation. Revocation is certainly not a synonym of alteration. To revoke a testamentary disposition plainly means to annul it; and the revocation of a clause implies the destruction of that clause. In legal contemplation it ceases to exist, and is as inoperative as if it had never been written. It is not necessary that the words erased should be wholly illegible, but the act of the testator must be such as to clearly indicate an intention to expunge the whole clause, so that it shall no longer constitute a subdivision of the will. But when by the obliteration of certain words a different meaning is imparted, there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements. The statute, after designating the modes of revocation, whereby that which has already been done is rendered inoperative by being destroyed, says in language wholly free from ambiguity, and, therefore, needing no construction: "or unless the same be altered by some other will or codicil in writing, or other writing, signed in the presence of three or four witnesses declaring the same."

There can therefore be no alteration in a testamentary disposition of real estate except by an observance of the formalities prescribed by the statute. In the will now to be construed the obliterations, so far from operating as a mere revocation, by destroying the sense of the context, impart to the clause a different and more important significance. Not only does this become apparent, but it is also evident that the construction which has been contended for, would be productive of the very evils which the Legislature intended to provide against. The

obliteration of two or three words might wholly change the character of a devise. As aptly illustrated by learned counsel in argument, if the words were "to my son William I give nothing, and give all my estate to my son John," the will could be made to read, without the insertion of any additional words, "to my son William I give all my estate."

But, as already intimated, this record does not present a question of revocation. It is clear that the testator did not contemplate an intestacy. He evidently intended to make a testamentary disposition of the whole of his property. It was supposed by the learned judge of the Circuit Court that he intended, by the obliterations, to diminish the fee simple estates of Leo and John E. Eschbach to life estates. If such was his purpose he has attempted to make another and a different devise of one-fifth of his whole property. He transfers the legal title, vested in Leo and John E. Eschbach, to trustees, and carves out of the fee simple equitable life estates with remainders to the children of the life tenants. This is a new will as respects the disposition of one-fifth of his property. Let it be supposed, by way of illustration, that the entire estate had been devised to Leo in fee simple. How could the testator subsequently vest the legal title in trustees, and create an equitable life estate with remainders? Not certainly by obliterations and interlineations, without attestation or the observance of any of the formalities prescribed by the statute. And it is a testamentary disposition of the one-fifth of an estate governed by a different principle? The intention of the testator is only to be regarded when the law sanctions the means which he has adopted to carry it into effect. If what he has done is invalid the intent cannot be respected.

In the formation of a judicial opinion the calm investigating faculty of reasoning should exercise a paramount control; but, in an effort to ascertain, by an inspection of this mutilated will, the real intention of the testator, the aid of imagination seems to become necessary. The aged testator declined to seek the advice and assistance of those whose professional learning and experience would have afforded safe guidance, and, relying solely upon his own judgment, failed in the

accomplishment of an intent which he has left involved in obscurity.

The true construction of this will is, that the attempted obliterations are inoperative, and that the will must be read just as it was originally written and executed. The renunciation of Leo and John E. Eschbach as executors, and the appointment of the complainants as trustees, by the order of 27th of September, 1881, from which no appeal has been taken, render a construction of the first clause of the will unnecessary. The trustees, appointed in conformity with a provision in the second clause and by a competent court having jurisdiction of trusts, have the control over the estate given to the trustees by the will as it was executed. The shares of Leo and John E. Eschbach are exempted from the operations of the trust thus created, and are to be held by them absolutely and in fee simple. The learned judge of the Circuit Court, having sought to give effect to the supposed intention of the testator to diminish the estates of Leo and John E. Eschbach, his decree is, in this respect, erroneous. But no other error is perceptible in said decree, which must, therefore, be affirmed in part and reversed in part.

Decree affirmed in part, and reversed in part, and cause remanded.

ROBINSON, J., dissented.

ALVEY, C. J. While I concur in the conclusion arrived at by the opinion of the court in this case, I do not concur in the reasoning upon which that conclusion is based. I shall therefore state briefly my views of the case.

That the testator intended to effect a change in the disposition of his estate by the erasures or obliterations made in his will, cannot admit of a doubt. The only question is, whether such obliterations can be allowed to have the effect of revocation under the statute.

Section 302, of Art. 93 of the Code, was literally transcribed from section 6 of the Statute of Frauds (29 Car. II, c. 3); and by that section it is declared that "No devise, in writing, of

lands, &c., or *any clause thereof*, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or burning, *cancelling*, tearing or *obliterating* the same by the testator himself, or in his presence and by his direction and consent." By the express terms of the statute, therefore, the testator was at liberty to revoke any devise or *any clause thereof* contained in his will, by simply cancelling or obliterating the same, without the ceremony of republication. And it is not disputed that the obliterations that appear in the will were made by the testator himself.

The testator left ten children ; seven sons and three daughters. By his will he appointed his two sons, John E. and Leo, his executors and trustees. He directed that his estate be divided into ten equal parts or shares, and he gave to all his children life estates in their respective shares, with remainders over to their children, except his two sons John E. and Leo, to whom he gave their respective shares absolutely and in fee. Some time after making the will, the testator, for some reason not apparent, erased or obliterated the names of his sons John and Leo wherever they occurred in the will ; and the will in that form was admitted to probate. According to the rational effect produced by the erasures upon the context of the will, the exception made in favor of his two sons would be revoked, and their fee simple estates reduced to life estates, as in the case of his other children. The clauses in the will making the exception in favor of the two sons being in their nature separate and distinct, should, if the revocation *pro tanto* were effectual, be regarded as entirely expunged from the will, and none of the terms employed in making the exception should be applied to the sons generally of the testator ; for that would plainly contravene the whole scheme of the will, and defeat the manifest intent of the testator. In other words, the will should be read as if the exception in favor of the two sons had never been incorporated in it.

Now, with respect to the competency of the testator to make revocation of a devise by the simple erasure or obliteration of the name of the devisee, I can entertain no doubt whatever. Nor can I entertain a doubt of the competency of the

testator to revoke *pro tanto* by simply reducing a larger to a smaller estate, when the act of revocation consists simply in erasing or obliterating the name of the devisee, or the terms by which the larger estate is given. But in all such cases we must have regard to the effect of such revocation upon the rights of other persons who may claim under the will. If the effect of such revocation is to enlarge the estate or interests of other devisees, or to raise new interests or rights under the will, then it is not simply a revocation, but a new devise, which can only be made by re-execution and re-publication of the will. This I take to be well established upon authority.

In the case of *Larkins v. Larkins* (3 B. & Pull. 16), a case arising upon the 6th section of the Statute of Frauds, the testator made a devise of land in due form to three persons as joint tenants in fee, and afterwards struck out the name of one of the devisees, without re-execution and re-publication of the will; and it was held, that the erasure would operate as a revocation of the will *pro tanto*. Lord Alvanley, C. J., said: "Whatever this alteration be, it is not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If, therefore, the devisees had been tenants in common, upon the erasure of one name the remaining two would take no more than two-thirds of the estate." The same principle was conceded in the case of *Short v. Smith*, 4 East, 419.

Then we have the recent case of *Swinton v. Bailey* (1 Ex. Div. 120, on appeal, and 4 App. Cas. [H. L.] 70), where the question underwent most thorough consideration. In that case, a testator, by his will duly executed and attested, devised realty to his mother, "Elizabeth Eley, her heirs and assigns forever." Some time after the execution of the will, the testator drew his pen through the words "Eley, her heirs and assigns forever," and then wrote the word "Eley" above the words erased. And on the question whether the obliteration cut down the devise from an estate in fee to an estate for life,

obliteration of any words or clauses in the will, by drawing lines through them *animo revocandi*, is a *pro tanto* revocation which the courts will carry out. *Sutton v. Sutton*, Cowp. 812; *Cogbill v. Cogbill*, 4 Hen. & Munf. 467; *Wolf v. Bollinger*, 62 Ill. 868; *Kirkpatrick's Will*, 7 C. E. Gr. 463; *Wells v. Wells*, 4 Mon. 155; *Tudor v. Tudor*, 17 B. Mon. 389; *Brown's Will*, 1 B. Mon. 57; *Wheeler v. Bent*, 7 Pick. 61; *Bigelow v. Gillott*, 128 Mass. 102.

And so where the existence of a will is proven, and no will can be found after the testator's death, the presumption, in the absence of any evidence to the contrary, is that the will was destroyed by the testator himself with the intention of revoking it. *Davis v. Sigourney*, 8 Metc. 487; *Newell v. Homer*, 120 Mass. 277; *Mercer v. Mackin*, 14 Bush, 484; 1 *Williams on Executors*, 148; *Tucker's Manual of Wills*, 94, 95, 152; 1 *Jarman on Wills* (R. & T.), 304, 305; 2 *Pomeroy's Equity*, 345, 346.

And when after the testator's death a holographic will, which it was known had been made many years before, was found in a private drawer of the deceased with the signature torn off, it was held, in Kentucky, that the tearing off of the signature must be regarded as the act of the decedent, and that it was torn off with an intention to revoke. *Youse v. Forman*, 5 Bush, 389; see also upon this point *Bell v. Fothergill*, L. R. 2 P. & D. 148; *Clark's Will*, 1 Tuck. 445.

The failure of one who is informed of the accidental loss or destruction of his will to publish another, furnishes a presumption of an intention to revoke the will so lost, but this is only a disputable presumption which may be rebutted by evidence, as, *e. g.*, the declarations of the testator himself. *Steele v. Price*, 5 B. Mon. 60.

But mere random statements by a testator, after making and publishing a will according to the forms of law, that he has made no will, do not amount to a revocation, and as evidence are of very little value. *Toebe v. Williams*, 80 Ky. 661.

Where a testator so entirely erased the name of a legatee that it was no longer apparent, and substituted another name for it, the court received evidence as to what the original name was, and restored it to probate, upon being satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee. In the *Goods of McCabe*, L. R. 3 P. & D. 94.

And it is held under the English Statute of Wills (1 Vict. ch. 26, § 21), that the court will not order a piece of paper pasted over a whole legacy to be removed; but, if the amount of the legacy only is covered, the legatee's name being untouched, the court will regard the doctrine of "dependent relative revocation" as applicable, and will order the removal of the paper. In the *Goods of Horsford*, L. R. 3 P. & D. 211.

By the expression "dependent relative revocation" is meant that the act of cancelling, etc., when done with reference to some other act which

is meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not.

The cancellation of the signature of a will made by scratches of a pen through it, but in such a manner as not to render it illegible, and such cancellation not being witnessed, will not be held a revocation. *Gay v. Gay*, 60 Iowa, 415.

And when a pencil, instead of a pen, is used in the attempted cancellation, it is usually considered merely a deliberative act (*Francis v. Grover*, 5 Hare, 39), and it must be shown by proof that it was intended to be final. *Bethell v. Moore*, 3 Dev. & B. (Law), 311; *Cogbill v. Cogbill*, *supra*; 2 Greenleaf on Evidence, § 681.

2. Alterations made after the execution of the will.—As to the effect of alterations conceded to have been made after the execution of the will, see in general, *Swinton v. Bailey*, 1 Exch. Div. 110; s. c. 48 L. J. Exch. 57; *Larkins v. Larkins*, 3 Bos. & P. 16; *Short v. Smith*, 4 East, 419; *Quinn v. Quinn*, 1 T. & C. (N. Y. Sup. Ct.) 487; *Bigelow v. Gillott*, 128 Mass. 102; *Haynes v. Haynes*, 33 Ohio St. 598; *Chase's Stephen's Digest*, 159.

A careful interlineation is said not to be an obliteration in the case of *Dixon's Appeal*, 55 Penn. St. 424; see also *Clark v. Smith*, 34 Barb. 140; *Lovell v. Quitman*, 2 Am. Prob. R. 351.

HURLEY vs. O'SULLIVAN.

[187 Massachusetts, 86.]

OMISSION OF CHILD FOUNDED ON MISTAKE OF LAW.

If the omission of a child from his father's will is intentional, he is not entitled to share in the estate, although such intention is founded on a mistake as to the legal effect of matters outside the will.

ACTION for partition.

C. A. Prince, for respondent.

W. E. Jewell, for petitioner.

DEVENS, J. Although the burden of proof was on the respondent to show that the omission of the petitioner from her

father's will was intentional, yet this did not give him the right to open and close. The petitioner still had the affirmative of the averments necessary to bring her case within the provisions of the statute, and that which the respondent sought to establish was matter in avoidance only. (*Ramsdill v. Wentworth*, 106 Mass. 320; *Dorr v. Tremont National Bank*, 128 Mass. 349, 358.)

The respondent was not entitled to the two rulings requested at the close of the petitioner's evidence. Without discussing them in any other respect, he did not propose to submit the case finally upon that evidence. Unless he did so, he could not require the judge to express an opinion upon the weight and sufficiency of the petitioner's evidence, or whether he had or not made out a *prima facie* case. The refusal of the judge to rule in accordance with his request, at this stage of the case, does not afford him any ground of exception. (*McMahon v. Tyng*, 14 Allen, 167; *Bradley v. Poole*, 98 Mass. 169; *Wetherbee v. Potter*, 99 Mass. 354; *Smith v. Westfield National Bank*, 99 Mass. 605; *Kingsford v. Hood*, 105 Mass. 495.)

There was evidence that the testator, at some time previously to the execution of his will, delivered to the petitioner the deed by which he held the title to what was known as "the Lake Avenue house and lot," the insurance policy thereon, and the key thereof, stating that he made her a present of it; and that she and her husband moved into it, with the knowledge of the testator, and resided there until after his death. Upon this evidence, and against the exception of the respondent, the presiding judge instructed the jury, that, if they found that the testator omitted to provide for the petitioner in his will because he supposed when he made it that he had given her a good title to the Lake Avenue house and lot, "and that, if it had not been for this supposition, he would not have omitted to provide for her in the will, this supposition is a mistake in law, and the omission is not an intentional omission in the sense of the statute, since it was not free from mistake, and is not such an intentional omission as will deprive the petitioner of her share of the testator's estate under the statute."

The Rev. Sts. c. 62, § 21, provided that, "when any testator

shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." This section has been re-enacted in the Gen. Stats. c. 92, § 25, and in the Pub. Stats. c. 127, § 21, with alterations of so purely verbal a character that they need not be considered. The history of this provision has been several times carefully traced in our decisions. (*Wilson v. Fosket*, 6 Met. 400; *Bancroft v. Ives*, 3 Gray, 367.) It has some bearing upon the inquiry presented by the case at bar, whether an omission is to be treated as intentional when the testator actually intended to do that which he did, namely, omit the name of a child, but was induced to do so by reason of a mistake made by him as to the legal effect of an act which he had before done. The Stat. of 1783, c. 24, § 8, had directed that any child, or his legal representatives in case of his death, not having a legacy given him by will, should have a proportion of the estate assigned to him, if not advanced. This statute had been construed by a series of decisions to exclude a child, even if he had no legacy given him, when he had been mentioned under such circumstances as to show that he was omitted from the will intentionally. (*Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 357.)

This construction had been put on two grounds: first, that it could not have been intended to restrain the unlimited power of devising by will when the whole object could be accomplished by the legacy of a shilling; and secondly, that the Stat. of 1783 was but a revision of the Prov. Stat. of 1700-1 (12 Will. II), c. 4; 1 Prov. Laws (State ed.), 430; modified by a subsequent provincial statute extending the rule to grandchildren. The first of these statutes contained the following preamble or recital: "Whereas, through the anguish of the deceased testator, or through his solicitous intention though in health, or through the oversight of the scribe, some of the testator's

children are omitted, and not mentioned in the will, many children also being born after the making of the will, though in the lifetime of their parents." This recital, it had been held, should be treated as if it were a part of the Stat. of 1783. It was not the intention of the commissioners who reported this section, or of the Legislature, to alter, by the adoption of the section in the Revised Statutes, "but only to give effect to the old statute of 1783, and to affirm and give the authority of positive law to the construction which had been put upon it in several cases." The effect of the law is, says Chief Justice Shaw, "that a child shall have a share as in case of intestacy, if the testator, at his decease, shall have made no devise to him and given him no legacy, unless it appear that such omission was intentional, and not accidental." (*Bancroft v. Ives, ubi supra.*) The object of the Rev. Stat. c. 62, § 21, was to guard the testator in his clear right to disinherit one of his children by his omission to mention him, if he intended to do so; but, as there might be momentary and accidental forgetfulness, owing to the distress of the testator, or mistake in reducing his intentions to writing, the expression and not by "mistake or accident" is introduced to enforce the meaning of the word "intentional," which is the governing word. The words "mistake or accident" are not to be construed as meaning such mistakes or accidents as would or might have caused the testator to entertain a different intention from that which omission from the will would show, but mistake or accident in the expression of the will or in its transcription. It was not intended to state two contingencies in which the omission from the will would operate to deprive the child of his share, namely, where the omission was intentional, and also where, but for a mistake or accident, the testator would not have done that which he intended to do, and actually did; but one only. The force of the word "accident" is not materially added to by the word "mistake," which must refer to errors such as are liable accidentally to occur in the preparation of a will, and not errors as to matters outside the will. To set aside a will which actually expresses that which the testator intended, because he acted under erroneous views of the law as applicable to his children

and his or their property, is to give a significance to the word "mistake" which the history of the legislation, the language used therein, and the reason of the matter, alike show was never contemplated. If the action of a testator is thus to be reviewed when it can be proved to the satisfaction of a court or jury that he acted under a mistake of law, it must equally be open to revision when they can be satisfied that he acted under a mistake of fact. If, therefore, he has intentionally excluded one son because he thought him a spendthrift or a profligate, or another because he thought him wealthy, and thus not in need of his bounty, and these shall appear upon a trial to have been errors, the children will, upon this theory, receive their proportionate shares of the estate from which the testator had excluded them.

The answer to an inquiry as to what a testator would have done, had certain facts, or the law upon certain facts, appeared otherwise than as they did to him, and as they appear afterwards to a jury, is too speculative and problematical to afford a safe ground of action. If a court and jury acted under better information as to facts, or under wiser views of the law than the testator possessed, it would without doubt be within the power of the Legislature to provide that they might cause the will to be set aside, so far as the effect of the intentional omission of a child was concerned; but it certainly would do so in very clear terms, as such legislation would materially interfere with the right which testators have heretofore had to exercise their own judgment as to all matters connected with the final disposition of their property.

The corresponding sections of the Revised Statutes and of the General Statutes have been before the court several times since their enactment, upon other questions than those here discussed. (*Wilson v. Fosket*, *ubi supra*; *Bancroft v. Ives*, *ubi supra*; *Converse v. Wales*, 4 Allen, 512; *Prentiss v. Prentiss*, 11 Allen, 47; *Wilder v. Thayer*, 97 Mass. 439; *Ramodill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Peters v. Siders*, 126 Mass. 135.) It is not important to remark upon these cases, except to say that in none does it appear that any mistake or accident *deshors* the

will was ever suggested as entitling a child who had been intentionally omitted to his distributive share.

We are of opinion that the construction of the section of the statute in question must be, that if the omission of a child is intentional, although it be proved to the satisfaction of the court and jury that the testator would not have entertained that intention but by reason of mistake or accident as to matters outside the will, the child is not entitled to a proportionate share of the estate.

Exceptions sustained.

FAIRFIELD vs. LAWSON.

[50 Connecticut, 501.]

CHARITABLE USE.—INDEFINITENESS.—EVIDENCE TO SHOW INTENDED BENEFICIARIES.

A bequest of which the income is "to be devoted to the education of the freedmen, and paid over annually to the proper officers of the Freedmen's Association," no association of that name being in existence, is too general and indefinite to be effectual as a charitable use.

A devise of realty to be sold and the proceeds held by the executor on a similar trust or "disposed of as he pleases," is equally void.

Evidence is inadmissible to show that testator told the scrivener he had in mind a particular Freedmen's Association organized by the Methodists in Cincinnati.

ACTION for the construction of the will of David Lawson.

The material clauses of the will are as follows:

"I give unto William M. Corbin three thousand three hundred and fifty dollars, in trust for my wife, Polly Lawson. Said trustee shall pay her the interest of said sum of money in manner following * * so long as she shall live. And from and after the death of my said wife, the interest shall be used and employed and devoted to the education of the freedmen, and the interest shall be paid over annually to the proper offi-

cers of the Freedmen's Association for that purpose by the said trustees.

"I devise unto my executor hereinafter named all of my real estate in whatever place situated, the same to be sold by him after my decease, and the proceeds to be held by him in trust for the education of the freedmen, and the annual interest and income arising from the same to be paid by him to the proper officers of the Freedmen's Association, or to be disposed of and used as he pleases.

"I give unto my executor hereinafter named all the rest and residue of my estate, to be disposed of by him in manner following: that is to say, the sum of five hundred dollars to be expended in erecting a suitable monument over my grave; and after the payment of the expenses of settling my estate, the remainder shall be held in trust by my said executor for the education of the freedmen, and the interest shall be paid over annually to the proper officers or persons of the Freedmen's Association by my said executor.

"I do hereby constitute and appoint Samuel E. Fairfield, Esq., executor of this my last will and testament."

It appeared that at the date of the will there were several associations organized for and engaged in educating the freedmen, amongst them "The Hartford Freedmen's Aid Society," "The New England Freedmen's Aid Society," and "The American Missionary Association," but none known as the "Freedmen's Association."

M. R. West, E. B. Sumner, and S. E. Fairfield, for plaintiff.

A. P. Hyde and D. Marcy, for defendants.

LOOMIS, J. Those parts of the will of David Lawson that are so obscure as to require the advice of this court, relate to the bequests to the Freedmen's Association and to Fairfield to be used as he pleases.

Who can take the legacy payable to the proper officers of the "Freedmen's Association?" We cannot advance a single

step toward the solution of this question unless resort may be had to parol evidence, because the record shows that there was no such organization or corporation in existence as the Freedmen's Association at the date of the execution of the will; and this expresses but a small part of the difficulty, for the further finding is that except a single item of parol evidence, the admissibility of which is one of the questions reserved, there was absolutely no evidence of any kind to identify the object of the testator's bounty.

The evidence in question consisted merely of the oral instructions given by the testator to the scrivener, Fairfield, "that he wanted to give the income of the property in question in trust for the education of the freedmen; that there was a Freedmen's Association organized by the Methodist Church people located in Cincinnati, Ohio, and that he wanted it payable to the officers of that association."

Now it is very common to admit parol evidence in cases for the construction of wills. The difficulty here is not owing merely to the fact that the evidence is oral, but to its relation to the written words of the will. The law is imperative that the entire will must be in writing, and herein are found the rules and limitations that must be applied to such evidence. The intent must in every case be drawn from the will, but never the will from the intent. The test, therefore, to be applied in all cases where evidence like that under consideration is tendered, is, whether there appears on the face of the will sufficient indication of intention to justify the application of the evidence. The words of the will are so controlling that if they apply with exactitude to one person, such person will take the legacy, although parol and extrinsic evidence might make it perfectly clear that another person less exactly described was the one intended.

This principle was applied by this court in the recent case of *Dunham et al. v. Averill et al.* (45 Conn. 61), where the legacy was to "The American and Foreign Bible Society," and it appeared that that society was one mainly supported by the Baptist denomination; but that there was another society supported by the Congregational and Presbyterian denominations,

named the "American Bible Society," sometimes called "The American and Foreign Bible Society," and that the testator's sympathies and preferences were all with the latter; and evidence was offered that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible Society sustained by the Congregationalists and Presbyterians; that he was not sure as to its corporate name, but believed it to be "The American and Foreign Bible Society;" but the evidence was held not admissible. So it has been uniformly held that parol evidence cannot be received to correct a mistake in the will. (*Avery v. Chappel*, 6 Conn. 270; *Comstock v. Hadlyne Ecc. Society*, 8 Id. 254; *Tucker v. Seamen's Aid Society*, 7 Met. 188; *Jackson v. Sill*, 11 Johns. 201.)

The principle we are contending for is also applied in another class of cases, where parol and extrinsic evidence is admitted. I refer to the rule derived from the maxim "*Falsa demonstratio non nocet, cum de corpore constat*," where the office of the parol evidence is to reject that part of the description which is false, but in such case it is indispensable that enough remains in *the words of the will* to show plainly the intent, but in no case can any words be added to the description.

Another prominent rule is, that when the question is one of construction the parol or extrinsic evidence must be ancillary to a right understanding of the language of the will; hence all direct evidence of intention as contradistinguished from evidence to show the meaning of written words in the will is inadmissible. This rule is well illustrated in the case of *Goblet v. Beechey*, given at length in the second American edition of Wigram on Extrinsic Evidence, p. 287, Appendix, and also briefly reported in 3 Simons, 24. Nollekins, the sculptor, by a codicil to his will, desired that "all the marble in the yard, tools in the shop, bankers, mod, tools for carving, &c.," should be the property of the plaintiff. A lady who was an attesting witness was offered to prove that before she subscribed her name she read the codicil in the hearing of the testator, and, when she came to the word "mod," she asked him what he meant by it, and he replied "models." Sir John Leach, Vice-

Chancellor, held the testimony inadmissible, but allowed an inquiry as to the meaning of the term itself from the testimony of sculptors. See, also, cases referred to in 2 Phillips' Evidence (Cowen & Hill's notes), p. 754.

So far the rules referred to, if applied to the evidence in question, rigidly exclude it. Is there, then, any exception or additional rule under which it may be received? The case shows that it was sought for the purpose of ascertaining the beneficiary, to prove the specific intention of the testator by his oral declarations to the scrivener who drew the will. There is only one rule that can be invoked as applicable to such a case. This is stated very clearly by Lord Abinger, Chief Baron, in *Hiscocks v. Hiscocks* (5 Mees. & Wels. 363), whose opinion, Redfield says, in his Treatise on Wills (vol. II, p. 566), is universally admitted to have settled the law that such evidence is only admissible in the one instance there stated, namely, "where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons, *each answering the words in the will*, the testator intended to express. Thus, if a testator devise his manor of *S.* to *A. B.* and has two manors of *North S.* and *South S.*, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls an 'equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing, and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

Now it seems to us that under this rule the proposed evidence cannot apply, because the words of the will describing the beneficiary do not apply equally to two or more, "each answering to the words of the will." On the contrary, the words used are not applicable to any known organization, either voluntary or incorporated. Such in substance is the finding. When, therefore, we learn from the parol evidence what the actual intent was, we do not "immediately perceive that the testator has effectuated his intent by the general words he has used ;" on the contrary, the effect of the evidence in this case is rather to increase the mystery that hangs over the words in the will. The name "Freedmen's Association" in itself considered would naturally import an association composed of freedmen, as the names "Lawyers' Association," "Doctors' Association," "Farmers' Association," would indicate the membership of each.

It is very strange, if the testator gave such instructions to the scrivener as the evidence indicates, that no one of the prominent features of his description should find its way into the will as written. The prominent things in his description were, the religious body that organized the association and its location at Cincinnati, Ohio, but of these things the words of the will are silent, and it does not appear how or why the words "Freedmen's Association" alone were used ; there was no discussion concerning the name ; no suggestion that the name used would be sufficient, nor that the Cincinnati society had ever been so called. As the case stands upon the record the instructions given by the testator were not carried into effect by the scrivener, and the court has no power to correct the mistake, as it would upon like evidence correct a mistake in a contract. We should be virtually making a will as to the beneficiary from the actual intent proved only by parol.

We have not deemed it necessary to review the numerous cases bearing upon this question. While there is now substantial harmony among the courts concerning the abstract principles that apply, there is, it must be confessed, considerable diversity in their application. We have, therefore, preferred to test the somewhat extraordinary features of this case

by a pretty strict application of the principles of evidence and construction, and our conclusion is that the parol evidence cannot be received for the purpose of showing that the legacy in question is payable to the officers of "The Freedmen's Aid Society of the Methodist Episcopal Church located in Cincinnati, Ohio;" and it is pleasant to know that this society will not be disappointed by this result, for it appears that, although they well knew the terms of the will and the fact of the pending litigation, yet they have never claimed the legacy in question.

The next question is, whether the trustees named in the will (or others to be appointed by the court for the purpose) can rightfully use and appropriate the income for the education of the freedmen as constituting a definite class of persons?

It is contended that, as the purpose and object of the bequests under consideration are the education of the freedmen, who constitute a definite class of persons, the charity will not be suffered to fail for the want of a competent agent to administer it. If this were the only difficulty in the case it might easily be overcome, for there is no doubt that the court can supply the want of a trustee. There is in fact no such want here. Corbin and Fairfield are named as trustees. But in each of the clauses where bequests are made for the education of the freedmen the trustees have no discretion given them in the will. On the contrary, all discretion is taken away by the express direction to pay the income over to the proper officers of the Freedmen's Association. When they have performed this duty there is nothing left for them to do under the will, and the court cannot prescribe an additional duty without in effect making an addition to the will. But it is argued that the freedmen are the *cestuis que trust*, and that if the trustees only pay the money for their education it effectuates the intention of the testator as indicated in the will; that the certainty required is only to point out the class, no matter how indefinite may be the particular recipients of the benefit within that class. It is found that the term "freedmen," as used in the will, refers to that class of persons who were emancipated during

the late civil war, and their descendants. As matter of common knowledge we may be permitted to say that the numbers composing this class are now about six millions. Of all these, only a very few individuals can by any possibility receive any of the benefits contemplated by the will. It is not within the range of probability that different individuals or corporations, separately charged with the duty of disbursing the testator's bounty, would so perform it as to benefit the same individuals of the class. A change therefore in disbursing agents, or a change in the mode of selecting beneficiaries, not provided for in the will, constitutes in effect a change of the bequest. Hence, in addition to a definite class it is indispensable that the will itself should prescribe some mode of selection, or give to some person a discretionary power to select; in short, a will must be executed in the way and manner which the testator provides, and if, owing to the indefiniteness of the object or the mode provided, this cannot be done, then the subject of the trust is not disposed of, but results to the benefit of those to whom the law gives the property in the absence of a valid will.

The cogent reasoning of Buskirk, J., in giving the opinion in *Grimes' Exrs. v. Harmon et al.* (35 Ind. 198), furnishes most ample support for the positions we have taken in this discussion. In that case the bequest was "to the Orthodox Protestant Clergymen of Delphi, and their successors, to be expended in the education of colored children, both male and female, in such a way and manner as they may deem best, of which a majority of them shall determine; my object being to promote the moral and religious improvement and well-being of the colored race." The court, after a most exhaustive and able review of all the authorities, held that the legacy was void for vagueness and uncertainty; placing the decision upon the following propositions—among others—that the testator intended that his beneficiaries should be selected from the children of the colored race residing within the United States; that the persons composing the class were very numerous, and as each one had a beneficial interest in the fund it would be utterly impossible to execute the trust; that under the will as construed by the court the trustees had no power or discretion to

select the beneficiaries from the class designated ; that there is no difference in principle whether a devise be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object ; that if it be immediate, to an indefinite object, it is void, and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results to the benefit of those to whom the law gives the property in the absence of any other disposition of it ; and that if a charity does not fix itself on a particular object, but is general and indefinite, and no plan or scheme is prescribed, and no discretion is given in the will to select the beneficiaries, it does not admit of judicial administration.

The remaining question relates to the construction of item second of the will, which reads as follows : " I do give, devise and bequeath unto my executor hereinafter named, all of my real estate in whatever place situated, the same to be sold by him after my decease, and the proceeds to be held by him in trust for the education of the freedmen, and the annual interest and income arising from the same to be paid by him to the proper officers of the Freedmen's Association, or to be disposed of and used as he pleases."

The construction of this clause of the will, we think, must depend on the question whether the idea of a trust adheres to the proceeds in the hands of the executor to the last, whether he pays it over to the officers of the Freedmen's Association, or exercises his own pleasure and discretion as to whom it may be paid to, or whether the trust drops out altogether at the commencement of the alternative clause, so that the bequest was either a trust or no trust at the will of Fairfield.

We think the first is the better construction. In the first place we think, if the testator had intended a personal gift to Fairfield, as he was a lawyer, and was employed to draft the will, and was made executor to administer it, that if he had so understood it, the terms of the will would have been more explicit, for it would have occurred to both that such a gift, covering as it did the principal part of the estate, would nec-

essarily excite the suspicions of the disinherited heirs, who would desire to defeat it. And in the next place, we think the language used indicates that the testator intended to stamp all this property with a permanent trust. The bequest is not to Fairfield by name, but to his executor, and the testator expressly says that the proceeds of the sale of all the real estate are to be held in trust by the executor, and then follows a statement of the purposes.

Upon this construction is the trust one that can be enforced? Lord Langdale, in *Knight v. Knight* (3 Beavan, 148, 174), defining the certainty required to create a valid trust, says: "Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain. And a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule." In 1 Jarman on Wills (5th Am. ed.), p. 680, it is said that "if the gift be expressly in trust, though to be disposed of in such manner and for such purposes as the devisees think fit, they are trustees, and the beneficial interest results to the heir or next of kin, and a gift 'to be expended and appropriated in such manner as the donees or a majority of them shall, in their discretion, agree upon,' would probably, without the words 'in trust,' produce the same result, for technical language of course is not necessary to create a trust. It is enough that the intention is apparent." (Citing *Fowler v. Garlike*, 1 Russell & Mylne, 232; *Buckle v. Bristol*, 10 Jur. [N. S.] 1:95; *Gibbs v. Rumsey*, 2 Ves. & B. 292. See, also, *Wheeler v. Smith et al.* 9 How. 79.) In *Morice v. Bishop of Durham* (10 Ves. Jr. 526) Lord Eldon says: "If a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take. Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is ex-

actly the same as if he had said that he gave upon trust, and stopped there."

We therefore advise the Superior Court that the oral declarations are inadmissible for the purpose claimed; that "The Freedman's Aid Society of the Methodist Episcopal Church located at Cincinnati, Ohio," cannot take the legacy given to the Freedmen's Association; that the bequests to the freedmen as a class are void for uncertainty; and that Fairfield takes nothing under the will.

In this opinion the other judges concurred.

See Goodale v. Mooney, *ante*, and references on page 6.

KNOX vs. KNOX.

[59 Wisconsin, 172.]

PRECATORY WORDS.—DEVISE WITH REQUEST FOR DIVISION BY DEVISEE.

A devise by testator of all his property to his wife, her heirs and assigns, with a "request that at her death she will divide" the same equally between his sons and daughters, constitutes a valid trust.

ACTION for the construction of a will.

The material portions of the will are as follows: "I give, devise, and bequeath unto my wife, Mary Ann Knox, her heirs and assigns forever, all my real and personal estate, money, tax certificates of sale, goods, chattels, and all other my worldly substance, of every nature and kind whatever, of which I may die seized or possessed, having full confidence in my said wife, and hereby request that at her death she will divide equally, share and share alike, in equal portions, as tenants in common,

between my sons and daughters, Thomas M. Knox, Jr., Richard C. Knox, Barclay Sidney Knox, John Knox, Mary Ann McMahon, now of Greensboro', North Carolina, and Kate L. Decker, the wife of Myron A. Decker, all the proceeds of my said property, real and personal, goods and chattels, hereby bequeathed."

Ordway & Hoyt, for appellant.

Stark & Brand and *S. U. Pinney*, for respondents.

TAYLOR, J. The two important questions to be considered in the construction of the provisions of the will above quoted are: *First*, Has the testator in his expressed request in said will clearly pointed out the persons whom he desired should be the recipients of his bounty, and has he clearly defined the part of his estate which he desired they should receive? and, *second*, Does the language used by him clearly show that he intended it to be obligatory upon his wife to whom he had devised all his property in fee, and not merely advisory? The learned counsel for the respective parties have, in their briefs and their oral arguments in this court, discussed these questions in all their bearings, and have cited and commented upon most of the leading cases in the English courts and the courts of this country, bearing upon them, and we acknowledge our obligation to them for the aid they have given us in the solution of the questions to be determined. The cases which have been before the courts involving the questions to be determined, are so numerous that it would be impossible to cite and intelligently comment upon and analyze them without writing a treatise upon the subject of implied trusts. We shall therefore content ourselves with the citation of a few general rules or principles which the law-writers upon this subject have deduced from the adjudged cases, as applicable to the proper construction of wills of the kind under consideration.

First. "It is not necessary that technical language should be used to create a trust. It is enough that the intention is apparent." (1 Jarman on Wills [5th ed.], 385, and note.)

Second. "That precatory words used in a will—that is, words of recommendation, entreaty, request, wish, or expectation—addressed to a devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used." (1 Jarman on Wills [5th ed.], 385 ; Lewin on Trusts, 118 ; 2 Story's Eq. Jur. §§ 1068, 1068a ; Hill on Trustees, 71 ; 2 Redf. on Wills, 410, 411.)

Third. In order to determine whether precatory words in a will create a binding trust, "the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." (2 Redf. on Wills, 416 ; *Williams v. Williams*, 1 Sim. [N. S.] 358 ; Hill on Trustees, 114 ; 2 Story's Eq. Jur. [12th ed.] § 1068b, and cases cited.)

Fourth. In determining that precatory words in a will create a trust, the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and that the *quantum* of the estate to be given to such person or object is also clearly defined. (1 Jarman on Wills, 396 ; 2 Redf. on Wills, 416 ; 2 Story's Eq. Jur. §§ 1070, 1071.) See, also, a very instructive note to the case of *Harrison v. Harrison's Adm'x*, 44 Am. Dec. 365, 369.

Taking these general rules for our guide in construing the will before us we have no serious difficulty in determining that the learned circuit judge properly construed the same. There is no dispute but that the persons to whom the precatory words apply are clearly pointed out by the will ; and the learned counsel for the appellant does not strenuously contend that the *quantum* of the estate which the testator requested should go to such parties is not also sufficiently and clearly indicated. The words used by the testator in describing the property he requests should go to his children after the death of his wife are, "all the proceeds of my said property, real and personal, hereby bequeathed." We think the argument of the learned counsel for the respondents

shows conclusively that the words, "all the proceeds," &c., as used in the will, do not mean the rents, issues, and profits of said estate, nor the surplus or residue which might remain at the death of his wife. To hold that the words, "all the proceeds," &c., meant the rents, issues, and profits of the estate is clearly inconsistent with the clear intent of the testator to make some provision for his wife during her lifetime. It would be absurd to suppose that the testator intended his wife should expend the body of his estate for her support, and retain the rents and profits of that which was not so expended for distribution among their children; and the words, "all the proceeds," &c., exclude the idea that he intended only such surplus as should be left by his wife after her death.

We are not called upon to determine upon this appeal what effect, if any, should be given to the fact—had the evidence shown it to be a fact—that the rents and profits of said estate were wholly inadequate to the reasonable support of the testator's widow, either in the construction of the words above quoted, or of the whole purpose and intent of the testator in regard to his estate. We are to presume, in the absence of all proofs upon this point, and from the fact that the appellant does not allege in her complaint that the income of said estate is not amply sufficient for her proper maintenance and support, that it is ample for that purpose. By the terms of the will we think it was the clear intention of the testator to provide a sufficient maintenance for his wife out of his estate, and that he supposed the rents and profits of the estate would furnish such support. The clear intent of the testator will not therefore be thwarted by holding that the estate she took under the will was a life-estate, as was held by the learned circuit judge, and that the words, "all the proceeds," &c., mean the entire body of the estate of the deceased, subject to such sales and conversions thereof as necessity or the interest of the parties might require.

The persons and subject of the testator's expressed request being sufficiently pointed out by the will, the only other question is whether the precatory words used by the testator were

intended by him to govern the conduct of his wife, to whom they were addressed, or whether they were merely an indication of what he thought would be a reasonable exercise of the discretion of his wife, leaving it, however, to her to exercise her own discretion. The learned counsel for the appellant in his brief insists that in construing these words great force should be given to the fact that the testator first devised and bequeathed all his property to his wife, absolutely and in fee; and that it should therefore be conclusively presumed that what follows was not intended by the testator to create a trust in favor of his children. We do not think this fact should have a decisive influence in getting at the intent of the testator. Had the testator intended to give his wife a life-estate in the property, coupled with a trust as to the remainder in favor of their children, he would probably have used the same language. He would have given the estate to her in fee, as he has done in this case; and if he had used technical language he would have added, "in trust for the following purposes," and then added, in substance, to receive the rents, profits and income thereof, for her own use and benefit during her lifetime, and at her death to divide the same among our children, naming them, in equal shares. The conveyance to the wife of the property in fee by merely technical words does not raise any very conclusive inference that he did not intend to engraft a trust upon the property so conveyed in favor of their children. It will be seen that those cases which have held that the words of bequest or devise which were held effective to repel the idea that any trust was intended to be imposed upon the estate by subsequent precatory words, were all cases in which some other language than the usual technical words to convey a fee were used, which clearly indicated that the devisee was to have the untrammelled control of the property devised. Such were the cases of *Spooner v. Lovejoy*, 108 Mass. 529; *Hess v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538. In this view of the case, there is no such direct conflict between the language used in that part of the sentence in the will which gives the whole estate to the wife and that which follows, requesting her, at her death, to divide the proceeds of the estate

among their children, as necessarily precludes the idea that the testator intended to create a trust in their favor.

Again, it is urged that if the testator had intended to control the action of his wife in regard to the estate devised and bequeathed to her, he would have used language which would not admit of any doubt, and which would need no construction. The language used is very clear in expressing what he desired she should do with the estate. Upon that point there can be no question. In the same section in which he makes the devise to his wife, he says, in effect, I give this estate to you in full confidence that you will, and I hereby request that at your death you will, divide all the proceeds of this estate among our six sons and daughters, naming them, in equal proportions. He might have used language of command, and said, I give this estate to you in the full confidence that you will, and I hereby direct and order that at your death you will, &c. ; but the use of such language would have negatived the expression of the confidence he claimed to have that his wife would carry out his desire, unless under the coercion of a direct command.

The effect which should be given to language of this kind, addressed by a husband to his wife, is very aptly and clearly stated by Bigelow, C. J., in *Warner v. Bates*, 98 Mass. 274, cited by the learned counsel for the respondents. It was urged in that case, as in this, that if a trust was intended, it should have been created by apt and technical words ; and in this case, as the testator was a lawyer, he must be presumed to have known what were apt and proper words to create a trust. This argument is answered as follows : " It is suggested that in other clauses of the will in which she creates a trust in favor of her daughters for their respective shares of the estate, of which they are to have the entire income after the death of her husband, she does not use words of entreaty, request, and recommendation, but apt and technical words by which to establish a trust in their behalf. But we think this suggestion not entitled to much weight. She might well express herself in different language when addressing her husband from that which he would use toward strangers, and at the same time intend a similar result. Words of confidence, entreaty, and recommenda-

tion, were natural and appropriate when used to express the will of a testatrix who intended to direct and control the conduct of her husband in a matter in which the right to give directions and to control belonged to her. In such case the words used by Lord Loughborough are applicable: 'When a person recommends to another who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility.' This language is equally forcible when applied to the case of the husband addressing his wife in his last will. (See, also, *Malim v. Keighley*, 2 Ves. Jr. 529; *Erickson v. Willard*, 1 N. H. 217, 227, 228.) The force of the argument of the learned chief justice rests upon the fact that a devisee or legatee, although for some purposes he may be deemed a purchaser, yet he is in another sense, in fact, a donee of the testator's bounty. What he receives is the gift of the testator; and it is evident to all that when a person receives property by the gift of another, the giver has a right to direct what the donee shall do with the property donated, and in such case a request would amount to a direction, when it would have no effect when addressed to a person who receives the property by an actual purchase for value paid therefor.

While, on the one hand, we are inclined not to go to the extent of the older cases in England and in this country, in establishing trusts upon the strength of precatory words used by a testator in his will, on the other we are not disposed to repudiate the whole doctrine of such trusts. We are disposed to apply the doctrine only in cases where it is clear that, on the whole, it was the intention of the testator to create such trust by the use of such words, and where the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the use and control of the property devised or bequeathed.

The argument in favor of sustaining precatory trusts is so forcibly and briefly stated by Bigelow, C. J., in *Warner v. Bates*, *supra*, that we take the liberty of making a more extended quotation from his opinion. He says: "We see no sufficient ground for calling in question the wisdom or policy

of the rule of construction uniformly applied to wills in the courts of England and in most of the United States, that words of entreaty, recommendation, or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject-matter on which it is to attach, or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain, moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite ; if the property to which it is to attach is clearly pointed out ; if the relations and situation of the testator and the supposed *cestuis que trusts* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty ; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee,

the just and reasonable interpretation is, that a trust is created which is obligatory, and can be enforced in equity, as against the trustee, by those in whose behalf the beneficial use of the gift was intended."

Testing the provisions of the will in the case at bar by the rules laid down by the learned chief justice in the above citation, and we have no hesitation in holding that it was the clear intent of the testator to create a trust in favor of the children named in the will; and that the language used by the testator was intended by him to govern and control the conduct of his wife in the disposition of his estate. Remembering, as was said by Chief Justice Marshall in the case of *Smith v. Bell* (6 Pet. 75), that "the first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law," we have no hesitation in saying that it is clear to us from the language used by the testator, that he did not intend to give his estate to his wife absolutely. Had such been his purpose, why did he take pains to point out so particularly what should be done with his estate when his wife died? If he intended that she should use it as she saw fit, and not to limit her to the use of the income thereof, and simply intended to advise her as to what he thought she ought to do with what might be left of it at her death, why did he say that "all the proceeds of my said property, real and personal, goods and chattels, hereby bequeathed," should be divided equally among his children? If we give any consideration to that part of the testator's language which follows the devise and bequest to his wife, in arriving at his intent, we are forced to conclude that he intended his request, as to its final distribution among his children, should bind his wife. It is clear that *his will was* that his children should take the property after the death of his wife. The language being clearly sufficient to show that such was *his will*, his request to his wife to so distribute his property must be construed as directory, and not simply as advisory.

The judgment of the circuit court is affirmed.

Precatory words.—1. It is not necessary that a testator use technical language in order to create a trust of this character. This is elementary learning. 1 Jarman on Wills (R. & T.), 680; Story's Equity Jurisprudence, § 1068, *et seq.*; Harding v. Glyn, 1 Atk. 469; s. c. 2 White & Tudor's Leading Cases, 1857, and note.

2. But it has long been the settled rule that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used. Pomeroy's Equity Jurisprudence, §§ 1014–1017; Perry on Trusts, § 112, *et seq.*; Handley v. Wrightson, 60 Md. 198; s. c. 8 Am. Prob. R. 580, and cases cited in the note; Inglis v. Sailor's Snug Harbor, 3 Peters, 99; King v. Mitchell, 8 Id. 326; Lawrence v. Cooke, 82 Hun (N. Y.), 126; Mabie v. Bailey, 95 N. Y. 206; Heermans v. Schmaltz, 10 Biss. 333; Eddy v. Hartshorne, 84 N. J. Eq. 419; Cresswell v. Jones, 68 Ala. 420; Major v. Herndon, 78 Ky. 123.

3. In every such case the question will arise whether the precatory words of the testator were intended to govern and control the disposition of the property, or whether the words were used merely in a commendatory or recommendatory sense. Eddy v. Hartshorne, 84 N. J. Eq. 419; Foose v. Whitmore, 82 N. Y. 405; s. c. 1 Am. Prob. R. 577; Williams v. Williams, 1 Sim. (N. S.) 358 [by Lord Cranworth]; Bernard v. Minshull, Johns. Chan. (Eng.) 276; Howarth v. Dewell, 6 Jur. (N. S.) 1360; 1 Perry on Trusts, Chap. IV; *In re* Hutchinson and Tenant, L. R. 8 Chan. Div. 540; Biddle's Appeal, 80 Penn. St. 258; Hunt v. Hunt, 11 Nevada, 442; Cockrill v. Armstrong, 81 Ark. 580; Van Ameer v. Jackson, 85 Vt. 178; Pomeroy's Equity Jurisprudence, § 1016; Hess v. Singler, 114 Mass. 56; Barrett v. Marsh, 126 Id. 213; Olliffe v. Wells, 130 Id. 221; Tucker on Wills, 118.

"In order to create a trust," says the Supreme Judicial Court of Massachusetts, in Hess v. Singler (114 Mass. 56, 59), "it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence." So, for example, it is held that no trust is to be implied from words in which the testator may be understood to state a motive, or assign a reason, for a gift, as, *e. g.*, the words, "to maintain the children," or, "that he may support himself and the children," or kindred expressions. Bryan v. Howland, 98 Ill. 625; Major v. Herndon, 78 Ky. 123; Knefler v. Shreve, 78 Ky. 298; Cresswell v. Jones, 68 Ala. 420.

And, in New York, a bequest to the testator's widow "during her lifetime, for the support of herself and my children," does not create a trust. Billar v. Loundes, 2 Demarest, 590; Clarke v. Leupp, 88 N. Y. 228; Wood v. Seward, 4 Redf. 271; Foose v. Whitmore, *supra*.

In a recent and carefully considered case it was held, by the Supreme Court of the United States, that a devise of property, "to be held, used

and enjoyed" by the beneficiary, "his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or as much thereof as he shall not have disposed of by devise or sale, shall descend"—to specified individuals—was a devise in fee simple to the first named, and that no trust was created by the words "with the hope and trust," and words following. *Howard v. Carusi*, 109 U. S. 725.

And, still more recently, in the case of *Colton v. Colton*, 21 Fed. Rep. 594, it was held, in the Circuit Court of the United States, in California, where C. by will left all his property to his wife, with full power of disposition, adding these words: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughters H. and C. as she may, in her love for them, choose to exercise," that no precatory trust was created by the use of these words of recommendation and request.

But at the other extreme, in the Court of Chancery in New Jersey, in a late case, the word "request" was held imperative. *Eddy v. Hartshorne*, 34 N. J. Eq. 419.

4. Although the modern tendency is very decidedly toward a restriction of this doctrine (see the note to *Handley v. Wrightson*, 3 Am. Prob. R. 530, 538; *Pomeroy's Equity Jurisprudence*, § 1015), when cases arise in which both the subject and the object of the trust are clearly defined in the precatory words or clauses, the courts will consider it evidence of an intention to create a trust. *Mabie v. Bailey*, 95 N. Y. 206; *Lawrence v. Cooke*, 32 Hun, 126; *Knefler v. Shreve*, 78 Ky. 297; *Heermans v. Schmaltz*, 10 Biss. 323; s. c. 7 Fed. Rep. 566; *Byers v. Hoppe*, 61 Md. 206.

In *Morice v. Bishop of Durham* (10 Ves. 535), it is said: "Wherever the subject to be administered, as trust property, and the objects for whose benefit it is to be administered are to be found in a will not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects are always used by the court as evidence that the mind of the testator was not to create a trust, and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended." Lord Eldon also says, to the same point: "Where a trust is to be raised characterized by certainty, the very difficulty of doing it is an argument which goes to a certain extent towards inducing the court to say it is not sufficiently clear what the testator intended." *Wright v. Atkyns*, Turn. & R. 157, 159.

"Upon the authority of the more modern decisions," says Prof. Pomeroy, "the whole doctrine may be summed up in a single proposition: In

order that a trust may arise from the use of precatory words the court must be satisfied, from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. Unless a gift to A. with precatory words in favor of B. is, in fact, equivalent in its meaning, intention and effect to a gift to A., 'in trust for B.,' then, certainly, no trust should be inferred." Equity Jurisprudence, § 1016.

When there is a plain intention to create a trust, it must be sufficiently defined so as to be carried into effect, otherwise "the legatee takes the legal title only, and a trust results, by implication of law, to the testator's residuary legatees or next of kin." *Nichols v. Allen*, 130 Mass. 211; *Schooler, Petitioner*, 184 Id. 426; *Wells v. Williams*, 136 Id. 333.

A devise to A. "to distribute the same in such manner as, in his discretion, shall appear best calculated to carry out wishes which I have expressed to him, or may express to him," is within this rule. *Olliffe v. Wells*, 130 Mass. 221. See, also, *Tucker's Manual of Wills*, 118.

CRAWFORD vs. THOMPSON.

[91 Indiana, 266.]

CONDITION SUBSEQUENT AND TRUST.—CONDITION AGAINST SECOND MARRIAGE VOID.

Testator made a bequest to his widow "on condition that she pay \$50 per year to my daughter, Martha Fox," and if Martha should marry a second time then "she shall not be entitled to said legacy from that time on" and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife."—*Held*, that the widow took the property as a trustee for Martha and the condition against marriage attached to the latter's gift was void.

Action to recover a legacy.

G. W. Paul and *J. E. Humphries*, for appellants.

G. W. Strafford and *W. W. Thornton*, for appellee.

BLACK, C. The following facts were shown, in substance, by the complaint in an action brought by the appellee against the appellants: Burr Quick died testate, in Montgomery county, in January, 1880. By the first item of his will he gave to his wife Elizabeth Quick, in lieu of her interest in his lands, certain real estate in said county. By the second item he devised certain other land to his daughter Cora. By the third, fourth and fifth items, he gave general legacies of money to his three sons. The sixth item was as follows:

"After the payment of my just debts and the above legacies, I give and bequeath all my personal property, including money, notes, accounts and all other personalty, to my said wife, Elizabeth Quick; that I devise said personalty to her on the condition that she pay one hundred dollars per year to my daughter, Martha Fox, as long as my said daughter shall live, provided that said money is to be paid to her only on the following conditions: First. That my said daughter shall not live with, or in any manner recognize, Asa Fox as her husband. Second. In case she, said Martha Fox, should live with him, said Fox, or recognize him as her husband, she shall not have the benefit of the above legacy during that time, but the same shall belong to my said wife. Third. However, in case said Martha should obtain a divorce from said Fox, or he should die, or she should abandon him after living with him, if she should so live with him again, then the right to said legacy shall revive, and she shall be entitled to the same from that time on until her death. Fourth. If said Martha shall remarry, she shall not be entitled to said legacy from that time on. Fifth. When said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more under said will, and the balance shall be retained by my said wife."

These were all the disposing provisions of the will. By a codicil the testator changed the will as follows: "Instead of one hundred dollars per year, which said will specifies shall be paid by my said wife to my said daughter, Martha Fox, as mentioned in item sixth therein, the same is changed to fifty dol-

lars per year ; and in no other respect is any change to be made in said will."

The will, with its codicil, was probated on the 31st of January, 1880, and the testator's widow, said Elizabeth, was appointed administratrix with the will annexed, on the 6th of February, 1880, and entered upon the discharge of her trust, and took possession of all the real estate devised to her by said will, and has ever since held possession of the same and enjoyed the benefits thereof. She also took possession of and retained all the personal property left by the testator. And the account in final settlement of said estate was filed and approved by the court on the 30th of September, 1881, and said Elizabeth received and receipted to the court for all the personal property remaining after the payment of all the just debts and the legacies, according to the conditions of the will. She thus received, after the settlement of the estate and the payment of debts and legacies and costs of administration, personal property to an amount stated in the complaint to be \$3,000; on the trial the amount was shown to be \$1,245 93 in value.

Said Asa Fox, husband of said Martha, died in the year 1880, and on the 30th of November, 1882, she married one Stidman Thompson, who is still her husband, living with her as such. She is the appellee.

Said Elizabeth paid said annuity of \$50 for two years, up to the 6th of February, 1882; and on the 6th of February, 1883, and afterwards, before the commencement of this suit, said Martha demanded payment of the annuity for the year ending February 6th, 1883. Said Elizabeth said she was willing to pay a proportionate part for the portion of the year up to the time of said Martha's marriage, that is, from February 6th, 1882, to October 30th, 1882, but claimed that the legacy ceased with and was defeated by Martha's marriage. Martha refused to receive less than \$50.

Said Elizabeth was married October 4th, 1882, to Jesse H. Crawford, and she and her said husband are the appellants.

The appellee sought by her suit to recover the amount of

said annual instalment of her legacy for the year ending February 6th, 1883, and interest thereon from that date.

The defendants severally demurred to the complaint, for want of sufficient facts. The demurrer was overruled, and the defendants answered by general denial. The cause was tried by the court. The finding was for the plaintiff, the amount of the recovery being \$51 20. A motion for a new trial made by the defendants was overruled, and judgment was rendered on the finding.

The appellants jointly, and the appellant Jesse H. Crawford, separately, have assigned as errors the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

The only question discussed by counsel concerning the complaint relates to its sufficiency as against the appellant Jesse H. Crawford. The question is whether, as the complaint did not otherwise show a reason for making said Jesse a defendant, the fact that he was the husband of his co-defendant, against whom a cause of action was shown, was a sufficient reason for joining him as a defendant.

The Code of 1852 (section 8) provided : " When a married woman is a party, her husband must be joined with her ; except : *First*. When the action concerns her separate property she may sue alone. *Second*. When the action is between herself and her husband, she may sue or be sued alone ; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

The act of March 25th, 1879 (Acts 1879, p. 160), while it greatly extended the powers of married women, and provided that a married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character, the same as if she were *sole*, did not repeal or modify the requirement of section 8 of the Code of 1852, that her husband must be joined with her when made a party defendant.

Section 11 of the Code of 1881, being section 254, R. S. 1881, substituted for said section 8 of the Code of 1852, pro-

vides, simply, that "A married woman may sue alone: *First*. When the action concerns her separate property. *Second*. When the action is between herself and her husband; but in no case shall she be required to sue or defend by a guardian or next friend, except she be under the age of twenty-one years."

We presume that it is because of this modification of the statute that counsel for appellants suppose that said Jesse was not a proper party. What effect recent legislation has upon the former practice of making the husband a defendant in actions against his wife, must be left for discussion in cases requiring it. The case at bar is otherwise controlled. This is a suit upon the liability of the wife contracted *dum sola*. At common law, in such an action, though satisfaction of the judgment was to be made out of the husband's property, the action was brought against both. (1 Chit. Pl. 57; *Platner v. Patchin*, 19 Wis. 333.)

In 1852 a statute was enacted (1 R. S. 1876, p. 550, the third section of which is still in force, being section 5127, R. S. 1881), and is as follows: "When any woman against whom any liability exists shall marry, and has or acquires lands, judgment on such liability may be rendered against her and her husband jointly, to be levied on such lands only."

Of course, in such case, both are proper parties defendants. The complaint shows that under the will the female defendant acquired lands which she still has. It is not sought by assignment of error to present any question as to the form of the judgment, and such question could not be successfully presented here, as it was not raised in any manner below.

The only other question to be decided is, whether the amount of the finding was too large, that is, whether the appellee was entitled to recover the whole amount of the annual instalment of the legacy or only a portion thereof, proportionate to the part of the year which expired before her remarriage. The parties had agreed upon the 6th of February as the date of the yearly payments, and former payments had been made accordingly. If the legacy should continue, notwithstanding the appellee's second marriage, she was entitled to interest from

the 6th of February, 1883, and in that event the amount recovered was not too large. The appellee insists, and the court below held, that the condition annexed to the gift to the testator's daughter Martha was void as being in restraint of marriage.

It is contended on behalf of the appellants, that there was no gift to Martha Fox, but that there was a gift to Elizabeth Quick on condition; that there was no condition except one applying to said Elizabeth, which was that she should pay Martha fifty dollars a year until she should marry.

In the sixth item the testator first used language importing a gift of the residue of the personal estate to his wife. He then said that he gave her said residuum on the condition that she pay a certain sum to his daughter Martha as long as she should live. He then provided that said money should be paid to the daughter only on certain conditions. He provided that it should be paid to her only on condition that she should not live with or recognize Asa Fox as her husband. He provided that the daughter should "not have the benefit of the above *legacy* during" the time she should live with her husband, Asa Fox. He provided that in certain events "the *right* to said legacy shall revive, and she shall be *entitled* to the same from that time on until her death." He provided that if she should remarry she should "not be *entitled* to said legacy from that time on." He provided, finally, that when the daughter should have received "an amount *out of said personalty* equal to three-fourths thereof," she should "not be entitled to any more under said will, and the balance shall be retained by my said wife."

The money to be paid to the daughter is spoken of as a legacy to which she should have a right, and to which she should be entitled, and it was payable out of said personalty; and, in any event, at least one-fourth of the personalty was to be retained by the wife.

We must take the intention of the testator from the whole clause. Was this a gift to the widow of the testator on condition? Conditions are either precedent or subsequent. If it was a gift to Elizabeth on condition, the condition was subse-

quent, and the continued existence of the legacy to Elizabeth depended upon the happening or not happening of an uncertain event, by which it might be defeated; that is, the gift to Elizabeth was subject to be divested by the non-performance or breach of the condition; in other words, the failure of Elizabeth to perform the condition, if there was a conditional gift to her, would work a forfeiture, and the whole surplus of the personalty would be recoverable from her by the personal representative of the testator.

Where the language of a will and the intention of the testator admit it, bequests expressed to be "on condition" subsequent are, in modern times, to be considered as imposing a trust, and not as conditions which shall take the property out of the legatee if he does not comply with them. (Williams' Ex. 1260.)

We do not think it was the intention of the testator to make a condition, the breach of which by Elizabeth would work a forfeiture of the residue of the personalty.

If there was here a clear gift to the wife there was as clear a gift of a part of the amount, through the wife, to the daughter. The will gave the daughter a vested interest, though the fund out of which it was to be paid was given to another. The widow was given one-fourth of the residue at all events, and she was created a trustee without discretion as to three-fourths thereof. The most favorable view for the testator's widow is that she was made a residuary legatee, with an express direction to pay out of the residuum a legacy to the daughter. This would make her a trustee for the latter legacy. The gift to the daughter is contained in the bequest to the wife. It is not payable to the daughter, at all events, or out of land, or out of the estate of the testator generally, but is payable out of a fund which might be greater or less, and only to the extent of three-fourths of that fund. The amount of the gift to the daughter depends on the amount of the residue of personalty. When the widow had, as executor, finally settled the estate, her relation as executor to the fund ceased, and she became a trustee for the daughter's legacy. The estate is not chargeable with the legacy to the daughter. To

say that the widow held the residue upon condition, subject to forfeiture, would, in the event of a breach of condition, send the fund back into the estate, and deprive the widow of the one-fourth given her absolutely, and deprive the daughter of her legacy. The wife, we think, was made chargeable with the legacy as a trustee. The trustee is personally liable for the payment of the legacy. A gift in trust upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void. (Perry, Trusts, section 515.)

The law upon the subject of conditions in restraint of marriage is a combination of the common law and the civil law as introduced by the ecclesiastical courts and construed and adopted with some subtle distinctions by courts of equity.

Conditions annexed to gifts, legacies and devises in restraint of marriage generally and absolutely, and those which are unreasonable because the donor has no right to control as to the donee's marriage, or exceeds his right, or so exercises it that it will probably operate as a general prohibition, are void, except a condition precedent annexed to a devise of land, which, though it be in complete restraint, will, if broken, prevent the taking effect of the devise. But conditions which annex a partial, just and reasonable restraint, considered with regard to the relation of the parties and the character of the restraint, not operating unduly, under the circumstances, upon the freedom of marriage, are not void.

It is plain that under such a rule and exception the question must depend, to a great extent, upon the circumstances of particular cases.

Among the distinctions established by the authorities are the following :

“ When a subsequent condition is annexed to a gift of personal property, if general, it is void ; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect ; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is operative.” (Pom. Eq. Jur. section 983, and authorities there cited.)

It appears to be settled by the authorities, English and American, that, in the absence of statutory provision on the subject, not only limitations but also conditions, whether precedent or subsequent, annexed to devises and legacies, restraining the testator's widow from marrying, are valid and operative. A condition subsequent, annexed to an annuity, in restraint of the marriage of the testator's widow, where there was no limitation over, has been held to be *in terrorem* merely and void. (*Parsons v. Winslow*, 6 Mass. 169; s. c. 4 Am. Dec. 107.)

The condition in restraint of the marriage of the testator's widow is treated as a condition annexing reasonable restraint, made by one having such a relation to the donee as authorizes him to take such an interest and assume such a control in regard to her marriage. Whether the cases which uphold such conditions are founded upon sound reason might, perhaps, be questionable, if the subject were original, especially where there are no children who are proper objects of the testator's bounty and protection. But the authorities have put the matter beyond question.

In this State we have a statute concerning a condition in restraint of the marriage of the widow of a testator, as follows: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void." (2 R. S. 1852, p. 308; section 2567, R. S. 1881.)

This statute operates to render void at least such conditions as are in general restraint of the marriage of the testator's widow. (*Stilwell v. Knapper*, 69 Ind. 558; 35 Am. R. 240.) In that case it was said of this statute: "We deem it unnecessary to determine whether our statute has done anything more than to place the widow of the testator upon a common level with other persons, in respect to restraints upon marriage; in other words, whether such reasonable restraints as would be upheld in regard to other persons may not be upheld in regard to such widows, under the statute above quoted. The statute may be construed to prohibit all restraints whatever upon marriage, or only such general restraints as could not be imposed upon others."

In the case now before us, the testator, after assuming a control in regard to the then existing marriage of his daughter, concerning the validity of which we are not called upon to decide, annexed to the gift to her of a legacy, payable in small annual instalments, a condition subsequent in absolute restraint of her remarriage.

If this should be regarded as a partial and reasonable restraint, which the testator had a right to impose, then, as the condition was subsequent and annexed to a gift of personalty, the question as to its validity would depend on the decision whether or not there was a gift over.

Shall a subsequent condition, annexed by a testator to a legacy to his daughter, in absolute restraint of her second marriage, be treated as a reasonable restraint in this State?

In *Newton v. Marsden* (2 J. & H. 356), decided in 1862, William Frost, by his will, declared certain trusts for the benefit of Caroline Derbyshire, widow of John Derbyshire, the testator's deceased nephew, and her children, under which the widow was entitled to certain rents of real estate and to annuities charged primarily on real estate, and to be made up, if necessary, out of personal estate, with a condition subsequent, that the trusts for the benefit of the widow should cease if she married. It was held that the condition was valid.

The learned Vice-Chancellor, upon an examination of the authorities, could not find anything in the shape of an opinion of a clear and definite kind. He concluded that, upon the whole, the dicta were against extending the rule that you can not impose a condition in restraint of marriage to a restraint on the marriage of a widow. Admitting that the general expressions in which widowhood was spoken of as constituting an exception to the rule were open to the suggestion that they must be considered as pointed at the case of a gift to the donor's widow, and also to the observation that they were extrajudicial, he based his decision upon the ground that there was no authority in the common law, independently of the civil law, for saying that a condition restraining the marriage of a widow is void.

In *Allen v. Jackson* (L. R. 1 Ch. Div. 399), decided in

1875, reversing the decision of Hall, V. C., it was held, that a condition in restraint of a second marriage, whether of a man or a woman, is not void. There, a testatrix gave the income of certain property to her niece (who was her adopted daughter) and the husband of the niece, during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived and married again. It was held that the proviso was valid and that the gift over took effect. *Newton v. Marsden, supra*, was spoken of by Mellish, L. J., as a bolder decision, and it was said by him, that not to apply the same rule to a man as to a woman would be to overrule that case. Baggallay, J. A., said, that "the present state of the law as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions to the general rule that conditions in restraint of marriage are void, and that the enunciation of that law has been gradual. In the first instance it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making a will in favor of his mother. * * * Then came the case, before Vice-Chancellor Wood, of *Newton v. Marsden*, in which it was held to be a general exception by whomsoever the bequest may have been made."

Thus it is seen that the exception applicable to such a case as the one at bar, has in England followed or been recently built upon an exception which many years ago was abolished by the statute of this State. There is with us much greater freedom of absolute divorce than in England. We have need of increase of population. Besides public morality and general prosperity are everywhere promoted by freedom of marriage, and we are not bound by precedent to declare a rule which would restrict such freedom.

If we were disposed to hold that the condition in question imposed a reasonable restraint, there was no gift over, within the meaning of the authorities.

The exception that the condition shall be effectual if the subject of the bequest be given over so as to create an in-

terest in another person is restrained and limited, and, to give it effect, the giving over to a third person must be an express giving over of the particular legacy, unincorporated with any other subject. A bare gift of the residuum, or merely leaving the legacy without any direction to fall into the surplus, will not be a sufficient giving over. (*Parsons v. Winslow*, *supra*, and authorities there cited.) Here all the personal estate of the testator remaining after the payment of debts and legacies was given to the appellant Elizabeth. The annuity to the appellee was made payable "out of said personalty" during her life or until she shall have received an amount equal to three-fourths thereof, and it was directed that the balance "shall be retained by" said Elizabeth. It was also directed that during the time that the appellee might live with said Fox, the legacy should belong to said Elizabeth. But no express disposition of the legacy "unincorporated with any other subject" was made to take effect when she should remarry. It was simply provided that if she should remarry she should "not be entitled to said legacy from that time on."

If, therefore, the condition in question should be regarded as annexing a partial and reasonable restraint upon marriage, it would be void for want of a gift over.

But we regard the condition as void, because it is an absolute prohibition of a second marriage.

The judgment should be affirmed.

SOUTH vs. SOUTH.

[91 Indiana, 221.]

EXECUTION OF POWER TO CONVEY FEE.—RECITAL OF INSTRUMENT CREATING POWER.

A testamentary power to convey a fee is well executed by a deed professing to convey the whole estate in the land although the will is not recited.

THE opinion states the case.

C. Foley, for appellants.

J. V. Hadley, *E. G. Hogate* and *R. B. Blaks*, for appellees.

ELLIOTT, J. The will of Henry South contains these provisions: "I will and bequeath unto my beloved wife, Sally South, all my estate, both real and personal, she paying all my just debts and funeral expenses, so long as she may live, and what may be left at the time of her death of either my personal or real estate, to be sold at public sale, and the proceeds thereof to be equally divided between my heirs, under the laws of this State, and I hereby give my said wife full power and authority over the same during her natural life."

"I also give her full authority to dispose of any of my personal property during her life that she may think proper, either for the payment of my debts or for any other purpose that she may see proper, or to make any changes in the same that she may think proper, and if my personal estate shall become exhausted, then, and in that case, I hereby authorize my said wife to sell and convey the real estate in as full and ample a manner as I could do if I were living, provided she remains of sound mind; and it is my will, and I hereby direct that my wife shall consult with my son Benjamin, in relation to making any sale of the property hereinbefore authorized; and should my wife become incapable of attending to business I hereby

authorize my said son to take charge of my said property and manage for her in the same manner as she is herein authorized to manage the same."

It is plain that the testator intended to vest a right in his wife to all of the property of which he died seized, and that he gave her an absolute power of disposition. The effect of the provisions we have quoted is to invest her with a right to consume all the property she chooses for her maintenance and comfort, and to sell, at her election, such property as she deems necessary for her comfortable support. That an estate is vested in her with full power of disposition, cannot be doubted; the only question is as to the character of the estate, whether for life or in fee. The general rule is this: Where an estate is given in general terms, without words of inheritance, but with full power of disposition, the estate is a fee. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition, or to appoint the fee by deed or will be annexed, unless there be some manifest general intent of the testator which would be defeated by adhering to this particular intent. (4 Kent's Com. [12th ed.] 536.) It is not, however, necessary to decide whether Mrs. South took a fee or a life-estate; it is sufficient for the purposes of the case to ascertain that she took an estate in the land coupled with an absolute power of disposition, and upon this point there can be no reasonable debate.

Conceding that the widow had a life-estate and not a fee, still that life-estate was joined with an absolute power of disposition, and where this is so, the deed of the devisee intended as an exercise of the power, will convey a fee. The deed passes not merely her life-estate, but also the estate of which she had the absolute right of disposition. This is the express holding in the well-considered case of *Clark v. Middlesworth*, 82 Ind. 240. If that case expresses the law correctly, it rules this, and that it does do so, we are well satisfied. In the case of *Barford v. Street* (16 Vesey, Jr. 135), the court said: "An estate for life with an unqualified power of appointing the inheritance comprehends everything." An absolute power of disposition is essentially the same as the power of appointing

an estate of inheritance, for if well executed it vests the fee in the grantee.

If the instrument executed by the person having an estate in the land and the absolute power of disposition indicates an intention to exercise that power, it is a valid execution of it, and will be upheld in favor of a purchaser for value. A general warranty deed executed for a consideration equal to the value of the fee and professing to convey the fee is a valid execution of the power. This is plainly so on principle, since to hold otherwise would be to declare that the grantor did not intend to convey the estate the deed engages him to do, and that the grantee meant to receive a less estate than that which the deed purports to convey. It would also involve the absurdity of assuming that the grantor intended to charge himself with a liability upon his covenants of warranty in a case where there rested on him not the slightest obligation to take upon himself any such responsibility. The authorities, with remarkable unanimity, agree in holding that the question whether the conveyance is in execution of a power or not, depends solely upon the intent. If, from the tenor and effect of the deed or will by which title is conveyed, the intent to execute the power is inferable, there is a valid execution of the power, or if, without referring to the power, the will or deed is not operative as the parties evidently intended it should operate, then it will be held a valid and effective execution of the power. It is not necessary that the power should be referred to in the deed or will, where the intent is otherwise manifested. The Supreme Court of the United States, speaking by the great equity judge, said: "Surely, it will not be pretended, that, in order to a due execution of a power, it is necessary that it should be recited or referred to in the executing instrument of conveyance. * * * It is sufficient, if the power exists, and is intended to be executed; and that intent is matter *in pais*, to be collected from all the circumstances of the case." (*Crane v. Morris*, 6 Peters, 598.) The same learned judge who delivered the opinion in the case just cited, gave the subject an exhaustive examination in the case of *Blagye v. Miles* (1 Story, 427), and declared that "All the authorities

agree, that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts, or deeds, demonstrating the intention." Cases in great numbers might be cited in support of this general doctrine, but there is no reason for doing so, because, when the question is examined, it will be found that there is really no substantial conflict upon the question.

The case of *Dunning v. Vandusen* (47 Ind. 423 ; 17 Am. R. 709) recognizes, very fully and explicitly, this general doctrine, but did not apply it to that case because it did not there appear that the consideration corresponded to the value of the estate in fee, and, as said in *Clark v. Middlesworth* (*supra*), this clearly distinguishes the case from one where the consideration paid is the value of the fee. That the consideration paid for the land in the case of *Dunning v. Vandusen* (*supra*), was not such as to raise the presumption of an intent to convey the fee, is shown by the fact that the complaint showed the value of the fee to be very greatly in excess of the consideration expressed in the deed, for it is averred in the complaint in that case that the rental value of the tract for which the grantee paid \$500 was \$500 per year, and of the other tract, for which \$270 was paid, \$250 per year. This was the admitted statement of the pleading, and in the face of it the court could not well have presumed an intent to convey both the life-estate and the remainder in fee. On the facts of the case, the decision was correct, and in harmony with the general principles which we have stated. That the case does recognize this general principle is shown by the fact that the opinion quotes from Kent this statement: "The power may be executed without reciting it, or even referring to it, provided the act shows that the donee had in view the subject of the power." (4 Kent's Com. 334.) So, too, are cited the case of *Blagge v. Miles* (*supra*) already quoted from, and the cases of *Jones v. Wood* (16 Pa. St. 25), and from the opinion in the latter case the court copied this language: "When the donee of a power to sell land possesses, also, an interest in the subject of the power, a conveyance by him, without actual reference to the power, will

not be deemed an execution of it, except there be evidence of an intention to execute it, or, at least, in the face of evidence disproving such intention." It is true that while thus giving recognition to the general principle, the court incidentally does refer to an English case where a somewhat stricter doctrine was held, but this doctrine was not adopted, nor was there anything more than a passing statement of it. To have adopted the stricter rule would have been to fly in the face of all the well considered modern cases. There are eminent English authorities which refuse assent to the strict rule of *Sir Edward Clere's Case* (6 Co. 18), and favor that of Sir Edward Coke, in *Scrope's Case* (10 Coke, 143). In speaking of this rule, Chief Justice Best said: "The rule given by Lord Coke is larger than that which has been deduced by the decision in Clere's case. Lord Coke's rule will be complied with if the intention to execute a power be *unequivocally manifested* by any circumstances occurring in the case, or any act of the owner of the power, without requiring any specified overt acts of such intention." (*Nowell v. Roake*, 2 Bing. 503.) In the comparatively recent case of *In re Teape's Trusts* (6 Moak's Eng. R. 801) a view was taken which harmonizes with that expressed by Chief Justice Best. In the case just cited, the owner of the power disposed of the estate entrusted to him by will without making any reference to the power, and it was held that the power was well executed, the court saying: "But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of; and, if that was a terminable interest, she will take it to the full extent of his disposing power, which, in this case, was for her own life." The American cases are in unbroken array against the strict rule of Clere's case.

In *Amory v. Meredith* (7 Allen, 397) the subject was well discussed, and the court repudiated the strict English rule and quoted what Lord St. Leonards said after reviewing the old English cases: "It is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Against the strict rule of Clere's case and in favor of the one that the intention

will control, however manifested, or however established, will be found, among others, the cases of *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270; *Funk v. Eggleston*, 92 Ill. 515; s. c. 34 Am. R. 136; *Wimberly v. Hurst*, 33 Ill. 166; *Butler v. Huestis*, 68 Ill. 594; s. c. 23 Am. R. 589; *Andrews v. Brumfield*, 32 Miss. 107; *Munson v. Berdan*, 35 N. J. Eq. 376; *White v. Hicks*, 33 N. Y. 383; *Drusadow v. Wilde*, 63 Pa. St. 170. In the latter case it was said: "It is only when the words of the will may be satisfied without supposing an intention to execute the power that it is no execution." It is said in Pomeroy's Equity Jurisprudence (sections 589, 590) that equity will enforce the defective execution of a power, because, "An attempt having been made to execute the power, which is only formally defective, equity imputes to the donee in making the attempt an intent to fulfill this *quasi* obligation." Judge Story says: "And where the intention to pass the property comprised in the power is clearly established, the court will give effect to the intention, although there is no intention expressed to act in execution of the power." (1 Story's Eq. 174a.)

We turn now to the cases directly supporting the proposition that a deed of general warranty, purporting to convey a fee and made upon full consideration, will execute the power. An able opinion is found in *Hall v. Preble* (68 Me. 100), in the course of which it was said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." At another place, the court, speaking of the person in whom the power was vested, said: "But she had a right and interest in the premises to convey them in fee for her sole use and benefit. Her power was not to convey in behalf and for the use of another. It was to convey for herself. Having granted all her right, title and interest in the premises to the tenant to hold in fee, she can not be held as having conveyed to him her life-estate only, still holding the power to convey to an-

other in fee. She conveyed for full value. Her deed sufficiently declares her intention to convey under the will, and by it the tenant took a fee." The question received consideration in *Campbell v. Johnson* (65 Mo. 439), and it was held that the execution of a warranty deed for a full consideration was a due execution of the power. The court there said, referring to cases sustaining this view: "The cases referred to are of high authority; they have the sanction of great names, and, avoiding the refinements and subtleties investing the doctrine of powers, they announce a rational and just rule, founded upon a liberal and enlightened equity. In the language of Lord Redesdale, 'when a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he has power to make it.'" The subject came before the Supreme Court of Ohio, and a like conclusion was reached, the court saying: "In any view of the rules on the subject, we think the deed may be properly regarded a sufficient execution of the power. We think no instance can be found where the property which is the subject of the power is distinctly described and referred to, and the disposition made of the property would fail, unless considered as made under the power, and there is no other objection to the mode of the disposition except the want of express reference to the power, that the execution of the power has been held to be invalid." (*Bishop v. Remple*, 11 Ohio St. 277.) In *Yates v. Clark* (56 Miss. 212) a like conclusion was reached, the court saying: "Each deed conveys a fee which she did not have in her own right, and which she could only convey by virtue of said will, and each deed contains a covenant of warranty of the title conveyed. It is manifest that it was intended to execute the power conferred by the will." In *Orr v. O'Brien* (55 Texas, 149) this doctrine is declared, or, to speak more precisely, acted upon without question.

There are many well considered American cases holding that where one having a power of disposition exercises it by will, it is a valid execution of the power without referring to or reciting it. The intent manifested by the will is all that is necessary

to execute the power, and this intent is sufficiently evidenced by a disposition of the entire interest in the property. There is no material diversity of opinion upon this subject, and the rule is to be taken for good and established law, as truly it is upon sound principle. If it be sound law, then it applies, as indeed the cases hold, to deeds as well as to wills; it is impossible to discover any difference between the instances, for they are but instances, resting upon one fundamental principle, and illustrated by many cases.

The rule is as just in operation as it is strong in principle. To hold that the failure to refer to the power avoids the conveyance, is to sacrifice the substance to the shadow. Of little, trivial importance is the mere form of the instrument as compared with the substance of the transaction, and the intention of the parties. A woman having a clear right to sell the fee of the land for her support, selling it for that purpose, executing a deed professing to convey the whole estate in the land to her grantee, he yielding a consideration reasonably equivalent to the value of the land, and she, intending to convey that estate, ought, in equity and justice, to be held to have conveyed the fee and executed the power, and the purchaser ought not to be deprived of what he had bought and paid for, because of a mere failure to refer to the power.

We affirm the judgment.

DEVLIN *vs.* COMMONWEALTH.

[101 Pennsylvania State, 273.]

ADMINISTRATION ON ESTATE OF LIVING PERSON.

A grant of administration upon the estate of a living person is void, and can be impeached collaterally.

ACTION of debt.

Peter A. Devlin died intestate in 1866. His eldest son, John F. Devlin, took his real estate at an appraisement and

entered into a recognizance for the payment of the distributive shares. The share of his brother James, who was dead, was allotted to his children, James, Martha and Mary. The latter had been absent and unheard of for more than seven years, and on a presumption of her death letters of administration on her estate were granted to her brother James, to whom, as such administrator, payment of her portion of the estate was made.

This action is brought by Mary B. Devlin, who was not in fact dead, against John F. Devlin, the cognizor, and Joseph E. Devlin, surety on the recognizance mentioned, to recover her distributive share. The defendants pleaded payment to her administrator.

C. S. Fetterman, E. A. Montooth, and S. A. Johnston, for plaintiff in error.

C. A. O'Brien, Breil & Fitzpatrick, for defendant in error.

GORDON, J. Notwithstanding the long absence of Mary B. Devlin, the plaintiff below, from the State of Pennsylvania, and although it may be, as alleged in the statement of the plaintiffs in error, that she had been unheard of for a period of fifteen years prior to the date of the issuing of letters of administration on her estate, yet the fact turns out to be that at that time she was alive. It follows, that those who undertook to act upon the presumption of her death must bear the consequences of the failure of that presumption. Let it be that the fact of so long an absence would, in many instances, raise a legal presumption of her death, yet, we presume, no one will contend that this legal presumption might not be successfully rebutted by proof that the person whose death it was thus sought to establish, was in full life. Let us take, for example, a son, under circumstances like those above stated, assuming the death of his father, and, on that assumption, as heir, selling the father's land. Should the supposed decedent afterwards appear, the title of the son's vendee would

be utterly void ; yet in this hypothetical case, the sale is supposed to be made on a legal presumption, which, so long as it continues, is perfectly good, and one on which the vendor might successfully defend in an action for a breach of the warranty of title. But in the case put, the son's title breaks down just where the defense to the plaintiff's claim, in the case in hand, breaks down, that is, upon a failure of the presumption upon which the parties acted. Presumptively the son had power to sell, in fact he had no such power ; presumptively the register had power to issue letters of administration on the estate of Mary B. Devlin, but in fact he had no such power. We cannot, therefore, but approve of what was so well said by the learned judge of the court below, *i. e.*, that the presumption interposed by the defendants to defeat the plaintiff's recovery was not even an important element in the case ; it was but evidence from which the register might assume the death of Mary B. Devlin, but it was no more conclusive than would have been the testimony of false witnesses to prove the same thing.

It might, indeed, be true, that were we to concede to the register judicial powers of a general character, as was conceded to the surrogate of the State of New York, in the case of *Roderigas v. The East River Savings Bank* (63 N. Y. 460), the decree in the case in hand might be regarded as conclusive until reversed ; but we are not disposed to regard this case as authority ; its standing as such is not only very much weakened by the dissent of three of the seven judges who composed the court, but, as was said by Judge Redfield, in his note to this case (15 Am. L. R. [N. S.] 212), the case is perhaps without precedent either in America or England.

But whatever may be the surrogate's jurisdiction under the statutes of New York, certain it is that under our Act of 15th of March, 1832, the register's powers are special and limited. By that Act he has power to issue letters of administration on estates of dead persons only, and not on estates of the living. His decrees are final and conclusive until reversed by a superior tribunal, when, under the statute, he has jurisdiction ; but if made without jurisdiction they are worthless and void, and may be impeached in any collateral proceeding.

That this granting of letters upon the estate of a living person, though supposed to be dead, is not only a voidable but a void act, is a legal conclusion supported by abundant authority. In *McPherson v. Cunliff* (11 S. & R. 422), Mr. Justice Duncan shows the distinction between those acts of the Orphans' Court which are voidable only and those which are wholly void. He says, that that which gives jurisdiction to the Orphans' Court is the death of the owner of the estate, and that if letters of administration were taken on the effects of a living man, or of one who died testate, the administration would be void, and there would be no administrator to act, no party before the court, consequently all the proceedings would be null ; but that where an executor obtains payment on a void will, such payment cannot be impeached, notwithstanding the probate was afterwards declared to be invalid. The distinction between the cases thus stated, he explains by saying, the probate on the will of a living person is *ipso facto* void, because of the want of jurisdiction, but where the person is dead, the Orphans' Court has power over his estate, and one acting on the faith of its decrees will be protected.

This is pretty much a restatement of the case of *Allen v. Dundas* (3 Durnf. & East, Term R. 129, 130), in which Justices Ashhurst and Buller hold precisely the same opinion. So the argument made use of by Chief Justice Marshall, in *Griffith v. Frazier* (8 Cranch, 23), is one of like import ; he says : " In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary ; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority ; because he had power to grant letters of administration in the case. But suppose administration be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. Yet the decision of the ordinary, that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, is not one

within his jurisdiction. It is not one in which he has a right to deliberate. It was not committed to him by law, and although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." At the risk of being considered tedious, I have thus quoted at some length from the opinion of the Chief Justice, for I regard it as settling, so far as persuasive authority can go, the case in hand.

Furthermore, in the case of *Jochumsen v. Suffolk Savings Bank* (3 Allen, 87), we have a case directly in point. In that case it was held, by the Supreme Court of Massachusetts, that a depositor in a savings bank might recover a deposit, though the amount had been previously paid to an administrator appointed under the erroneous presumption of the depositor's death arising from his absence for more than seven years without being heard from.

Dewey, Justice, who delivered the opinion, fully sustains the judgment of the court by an able argument and the citation of numerous authorities. To my mind, he very clearly proves that the decree of a probate judge in granting letters, under the circumstances stated, may be collaterally attacked and avoided for the want of jurisdiction. He remarks, *inter alia*, the position is that seven years' absence from home without being heard from, authorizes the probate judge to treat the case as though the party were dead. But he exposes the error contained in this proposition by calling attention to the fact, that the circumstances alleged are but evidences of death, and that they may be rebutted by showing the fact to be otherwise; hence, the presence of the supposed dead man leaves no ground on which to support the jurisdiction. We think this is sound reasoning and worthy of our adoption. Under a contrary doctrine a living man might be obliged to stand by and see the administration of his own estate, or he might be forced to cite his executor or administrator to account in order that he might be enabled to get possession of the remains of his own property.

Among several cases, to which our attention has been directed by the counsel for the plaintiff in error, is that of *Miller v. Beates* (3 S. & R. 490), where, on the presumption of

the death of one John G. Schlosser, arising from absence of many years without being heard from, a legatee over was permitted to recover without being required to give a refunding bond. Here, however, there was no pretence in the way of evidence to rebut the presumption of the death of the first taker, hence, nothing to impeach the decree of the register. More than this, the executor was fully protected by the judgment of a court having undoubted jurisdiction over the parties, and whose judgment could not be collaterally contested. There is, therefore, no kind of analogy between this case and the one in hand. Had John F. Devlin been compelled, by a court of competent jurisdiction, to have paid to the administrator the money in controversy, his case would have been very different, but having voluntarily made payment to one whose authority was, at best, but *prima facie*, he assumed all risks, and must now bear the consequences of the failure of that assumption.

The judgment is affirmed.

See *Stevenson v. Superior Court*, 3 Am. Prob. R. 424.

FAULK vs. DASHIELL.

[62 Texas, 642.]

POWER TO SELL INCLUDING POWER TO MORTGAGE.

Power to an executor "to sell, exchange, and dispose of" land as he may deem necessary for the interests of the testator's children, includes a power to mortgage.

ACTION of trespass to try title.

Felix Robertson and Herring & Kelley, for appellants.

Clark & Dyer, for appellees.

WALKER, P. J. Considering first the first ground of assigned error, we are of the opinion that it does not appear from

the deed of trust, viewed in connection with the evidence in the case, that it was the intention of W. B. Dashiell to limit the conveyance made in it to his own particular interest in or title to the property described in it. It would be altogether too close and technical a construction applied to the words "all my right, title, interest and claim," under the evidence, for a court having equity jurisdiction to confine their meaning to the right, title, interest and claim of the grantor in his personal and individual right.

It appears from the will that he possessed no other title nor interest in the property than such as he held in his fiduciary relation as trustee under the will. His deceased wife having died, leaving a will which in express terms devised and bequeathed to her children all her property, both real and personal, he did not inherit the life-estate in one-third of the lands of the deceased, as otherwise he would have done. He therefore had no interest whatever in the land, and the instrument must be construed as being meant to convey the title and interest of some one; and the construction, where the terms used are doubtful or ambiguous, will be given to it which is most strongly against the grantor.

Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right. (1 Wait's Act. & Def. 124, citing *Noonan v. Bradley*, 9 Wall. [U. S.] 395, 407; *Barney v. Newcomb*, 9 Cush. [Mass.] 46.)

And where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he knew or had reason to suppose it was understood by the promisee. (1 Wait's Act. & Def. 124, citing *Hoffman v. Etna Ins. Co.* 32 N. Y. [5 Tiff.] 405, 413; *Barlow v. Scott*, 24 N. Y. [10 Smith] 40.)

And when it becomes necessary to inquire into the intent

of the parties to a deed, the court will take into consideration the circumstances attending the transaction and the particular situation of the parties, the state of the thing granted, etc., at the time. (2 Wait's Act. & Def. 504, and authorities there cited.)

It is obvious that from the application of these rules of construction it must result that the deed of trust was intended to operate upon the right and title of the estate of Mrs. Dashiell in the land; that the mortgagee must have thus understood it when he loaned the money, and that W. B. Dashiell must have supposed that it was so understood by Beatty at the time. The attendant facts and circumstances negative the idea that the terms "as executor of C. A. Dashiell, deceased," added to the grantor's signature, were used as words merely descriptive of the person. In addition to these considerations, W. B. Dashiell, in the body of the instrument, purports to act in the premises "as executor," etc. He being vested under the will with the legal title in trust with power to convey, it will be intended by the court in construing the instrument in question, under the attendant facts, that, without regard being paid to the form of expression heretofore referred to, the whole interest in the land that was thus vested in W. B. Dashiell was conveyed by it.

The case of *Daughtrey v. Knolle* (44 Tex. 454) is quite analogous on the point under consideration to this case, and the principle there applied seems broad enough to be decisive of the question in this. (See, also, *Hough v. Hill*, 47 Tex. 153, citing *Robins v. Bellas*, 4 Watts [Pa.], 256; also, see *Rogers v. Bracken*, 15 Tex. 564.) The principle involved, and the rule to be followed, are clearly expounded in 2 Perry on Trusts (3d ed.), sec. 511 (c.), which see; also *Norris v. Harris*, 15 Cal. 226. The construction of the powers granted under the will, contended for under the second assigned error, is, we think, correct.

Wills are to be construed with liberality, so as to arrive at the intention of the testator; regarding forms of expression contained in them, or technical terms and words, far less than

in deeds or other formal instruments intended to operate *inter vivos*.

Many of the features of this will are identical with those contained in the will which was construed in the case of *Orr v. O'Brien* (55 Tex. 155), which see. The will in that case constituted the executrix such without bond and independent of the probate court; it gave to her all of the testator's personal and real estate "for and during her natural life, to be applied as she may deem best to the maintenance of herself" and their children. It provided that in the event of her death, "such of the property as may be left" should be divided equally among the children; and declared it to be the purpose of the testator to make his wife "the unrestrained controller" of his property. Under these powers, without specific designation of authority to sell, it was held, in that case, that an absolute conveyance of real estate by the executrix vested the title.

Powers equally explicit, comprehensive and altogether of an analogous character, on the subjects embraced in the other will, are contained in this, as will be readily noticed by a comparison of the two. It seems to have been the intention of Mrs. Dashiell to unfetter, as far as she might be able to do by the use of apt and comprehensive expressions of her wishes, the discretion of her husband in respect to the management, control and disposition of her property so as to subserve what he might regard as being the interest of their children. The will directs that he shall, for the object which seemed most to interest her—the future welfare of her children—"manage and control" her entire estate "as he may think best" for the children's interest. This desire is again expressed in another part of the will, directing that he shall take charge of said estate, and manage and control it for the support, maintenance and liberal education of her said children, followed by directions for the disposition of the residue remaining in the hands of the executor after raising and educating the children.

The authority thus conferred by the will confides to the judgment of the executor the mode by which he shall give ef-

fect to the main purposes of the trust. The will contemplates the necessity of raising money wherewith to support, maintain, and furnish a liberal education to the children, and it anticipates the possibility that in doing these things that a portion and perhaps all the property may be consumed. The management and the control of the property to effect these objects is unrestricted and unlimited otherwise than as the executor "may think best." The exercise of such a discretion as this evidently includes the choice of selling, leasing, or of mortgaging the property if necessary, in his opinion, to raise money for the objects of the trust. (See *Orr v. O'Brien, supra*; *Danish v. Disbrow*, 51 Tex. 235.)

Where the power is general to perform and carry out a particular object, a resort to the ordinary and usual methods or means comes within the scope of the power. (See *Layet v. Gano*, 17 Ohio, 473; 10 Ohio St. 396; and see 1 Wait's Act. & Def. 221; *Bridenbaker v. Lowell*, 32 Barb. 9, 18; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46.) And in respect to an assignment or conveyance in trust, which contemplates a necessity for the raising of money, as to pay debts or the like, it seems that in the absence of express directions given in such, if the whole scope of the deed show that the parties must have intended a sale, a sale will be properly made; for, in expounding trusts, though created by deed, the intention of the parties is to be pursued as much as in wills. (See Hill on Trustees, star p. 342.) The same principle is equally applicable, it seems, to raising money by mortgage. (Id.)

The general power which the will conferred, to manage and control the property as the executor might think best for the interest of the children, embraced, we think, the power to mortgage or to sell in order to carry out the purposes of the trust; and the only remaining question is whether the will contains any provisions in it which have the effect to qualify or limit this general authority.

It is urged by appellees' counsel that the general authority conferred was restricted by the terms used in the will, which empowered the executor "to sell, exchange and dispose of"

the estate as he may deem necessary for the interest of the children. We think that these words, instead of being used in a restrictive sense, were intended to render more clear and absolute the authority and power meant to be conferred in the preceding and subsequent parts of the will which gave the executor full control and management of the estate for the purposes named. The power "to sell, exchange and dispose of" is consistent with the existence of the general powers conferred, and if the character and scope of the latter are varied by the specific designations thus indicated, the effect is to enlarge and extend the executor's authority over the disposition of the property, rather than to contract, limit or diminish it.

The sentence in the will which invests the executor with his powers, directs that he shall manage and control the estate as he may think best, and in terms not less general and comprehensive, and indicative of the testatrix's wish that her husband should be wholly unrestricted as to the modes whereby he should act in carrying out the purposes of supporting, maintaining and liberally educating her children, proceeds to instance the most absolute power that could be held by him as to the property, viz.: by selling it as he saw proper. She next provides for exchanging it if he saw proper; and last, in order to embrace any other supposable method of using the property to the children's advantage, she employs the general expression, that he may "dispose of the estate in such way as he, in his discretion, may judge to be necessary for the interest of said children," and adds that his discretion shall not be hampered by responsibility to any one by reason of his free exercise of it in respect to the powers given to him. Reading the sentence as an entirety, and not in isolated, detached parcels, it is obvious, we think, that it manifests as a whole a single intention to invest her husband with the most ample power to use, control, and in any wise dispose of the property, and that there is no portion of it which warrants the interpretation of an intention to restrict or limit the executor's authority. Language more expressive of her confidence in the ability of her husband to manage the estate, and of her desire to invest him with power to dispose of the property in any way whatever that he deemed

best calculated to promote the interest of their children, independent of all direction or dictation of any tribunal, and of responsibility to any person whomsoever, could hardly be used.

We are of the opinion, therefore, that there was ample authority conferred by the will on the executor to mortgage the land; and under a power for purposes so general and undefined as to particulars, the mortgagee would not be bound to ascertain the necessity for the loan to the executor, nor to see to the application of the money. (See Hill on Trustees [2d Amer. ed.], p. 480; *Danish v. Disbrow*, 51 Tex. 241; 1 Wait's Act. & Def. p. 328, sec. 3, and authorities there cited; *Sanger Bros. v. Heirs of Moody*, 60 Tex. 96.)

If, however, we are to regard the power conferred on the executor "to sell, exchange, or dispose of, as he may deem necessary for the interest of my children," as a limitation upon the authority otherwise given in the will, it seems that the result must still be the same. Under a power to sell lands for the payment of debts, a mortgage, it seems, may be given to raise money for that purpose, unless it be the clear intention of the testator, in directing the sale, that his real estate should be absolutely converted. And although there may be no specific direction for the sale of the estate, but only a trust to raise or to pay debts; or a devise subject to or charged with debts; or the debts and legacies being first deducted—in all these cases the trustees may properly raise the required amount by sale or mortgage, without waiting for a decree. (Hill on Trustees [2d Amer. ed.], pp. 499, 500 [star p. 355].) It is laid down in many cases that a power of sale implies a power to mortgage. (See *Gordon v. Preston*, 1 Watts, 385; *Lancaster v. Dolan*, 1 Rawle, 231; *Williams v. Woodard*, 2 Wend. 492; *Duval's Appeal*, 38 Pa. St. 118; *Steifel et al. v. Clark*, 9 Bax. [Tenn.] 470. See, also, 4 Kent's Com. 148; 3 Rawle, 109; 2 Wright [Pa.], 118; *Zane v. Kennedy*, 73 Pa. St. 182. And see numerous other cases collected and synopsized in a note in *Ferry v. Laible*, 31 N. J. Eq. [4 Stew.] 567 *et seq.*)

In some other cases this doctrine has been denied, and in its application subjected to considerable modification. (See

Hill on Trustees [2d Am. ed.], note 1, p. 499; and see *Bloomer v. Waldron*, 3 Hill [N. Y.], 361; *Ferry v. Laible*, 51 N. J. Eq. [4 Stew.] 577; *Page v. Cooper*, 16 Beav. 396; *Wood v. Goodridge*, 6 Cush. 117; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Contant v. Servoss*, 3 Barb. 128; *Tyson v. Latrobe*, 42 Md. 325; *Hubbard v. German Catholic Cong.* 34 Iowa, 31.) Without attempting to indicate which of these lines of decision should be accepted as furnishing the proper rule to follow, it is sufficient to say that, under this state of the law upon the point, the testatrix might well have supposed that in conferring the power "to sell" the authority was conferred thereby to mortgage the property.

But she extends still further the specifications of authority given to her husband. If it was her intention to limit it to that of selling, and to exclude the power to mortgage or to incumber, it would have been but superfluous redundancy to have added the authority "to dispose of my estate as he may deem necessary for the interest of my said children." Effect should be given to every part of the instrument if it may be done consistently with the intention of the testatrix and with its other parts. In *Gordon v. Preston* (1 Watts [Pa.], 386), on the question whether a certain incorporated company had, under its charter, power to mortgage, Gibson, C. J., said: "By the second section of the act of incorporation the company was authorized to purchase in fee or for any less estate 'all such lands, tenements, or hereditaments, and estate real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and *dispose of* at their pleasure.' According to the principle of *Lancaster v. Dolan* (1 Rawle, 131), a power to sell includes a power to mortgage, even under the statute of uses, though strictly construed; and *a fortiori* it ought under a statutory grant which is to be beneficially construed in furtherance of the object. But the super-added words 'dispose of,' which would otherwise be redundant, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to the mode of its operation; and as a power to incumber might be necessary to the prosecution of

its works, it is not to be doubted that it was intended to be given."

Nor is there less doubt, for the same reasons, that Mrs. Dashiell intended to confer, by the use of the same term, the powers which were accorded by the opinion of Chief Justice Gibson to the incorporated company. Whilst it may be true that those words might not in every supposable connection and relation, when employed in written instruments, import such extended authority, and might, according to the subject-matter upon which they are to operate, and under all the circumstances existing for their interpretation, be limited to narrower bounds in their interpretations, yet, in the connection and relation in which they are here presented—"in furtherance of the objects" for the accomplishment of which the testatrix, as manifested by the whole will, was endeavoring to provide—we think it clear that the power conferred by the use of those words place it beyond dispute that the executor was fully authorized to mortgage the land.

We must look to all parts of a will to ascertain the intention of the testator. (*Vardeman v. Lawson*, 17 Tex. 18.) Under this rule the construction of discrepancies and seemingly contradictory or repugnant clauses of it will be reconciled, and thereby effect given to what were the true intentions and wishes of the testator. (See *Wells v. Slater*, Tex. L. Rev. 121 [unreported case].)

For the errors indicated, we conclude that the judgment ought to be reversed and rendered by the Supreme Court in favor of the defendants. The cause having been submitted to the court without a jury; the facts not being controverted which involve the merits of the suit, and presenting only a question of law as to the rights of the respective parties to the suit; and there being apparently no reason why the trial below should not finally determine this suit, we are of the opinion that the Supreme Court ought to render, on this appeal, such judgment as ought to have been rendered on the evidence adduced at the trial, which, as above indicated, ought to be for the defendants.

Reversed and rendered.

When a power to sell includes a power to mortgage.—It may be gathered from the authorities, that whether a power to incumber property by a mortgage is included in a power to sell, is a question to be determined entirely by a consideration of the nature and objects of the trust—whether the power be a mere naked power or a power coupled with an interest—and the nature and character of the property itself. It is a question of fact, to be determined in the light of all the attendant circumstances. No general rule of law can be formulated.

In *Hoyt v. Jaques*, 129 Mass. 286; s. c. 1 Am. Prob. R. 157, it is held, that a devise of so much of the testator's estate, as may be sufficient for the maintenance of the devisee during his life "he having full power to sell and convey any and all of my real estate at any time, if necessary to secure such maintenance," does not give to the devisee the right to mortgage the estate in fee. The court says: "This language does not in its terms impart a power to mortgage, and we find in the will no decisive indications that the testatrix intended to use it in any other than its natural and obvious meaning. Thus used, it gives the husband power to sell and convey for a fair price, any or all of the real estate, if necessary for his comfortable support, but it does not give the right to mortgage the estate for a part only of its value. The intention appears, from her language, to have been that her husband, if it becomes necessary for his support, might sell the real estate and convert it 'out and out,' and not that he might at his discretion charge it with incumbrances and liens."

In *Wood v. Goodridge*, 6 Cush. 117, it is said that, in the ordinary case of a power "to sell and convey" land given by a principal to his attorney, it is clear that the attorney would not be authorized to mortgage the land. It is argued that the two transactions of a sale and a mortgage are essentially different; that a power to sell in such a case implies that the attorney is to receive, for the benefit of the principal, a fair and adequate price for the land. While a power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken on a foreclosure for only a part of its value, and, by parity of reasoning, that, under a will, a trust to sell *prima facie* imparts a power to sell "out and out," and will not authorize a mortgage unless there is something in the will to show that a mortgage was within the intention of the testator. 2 Perry on Trusts, § 768.

In *Wilson v. Maryland Life Ins. Co.* 60 Md. 150, it was held that the words "My said trustee shall have power to invest, and change the investment of said moiety, and for that purpose to sell, convey, and dispose thereof, or any part thereof, as often as he may think proper," did not authorize the trustee to mortgage the property to secure the repayment of a loan. To the same effect is *Stokes v. Payne*, 58 Miss. 614; s. c. 3 Am. Prob. R. 28; *Hubbard v. German Congregation*, 34 Iowa, 34; *Head v. Temple*, 4 Heisk. 84; *Bloomer v. Waldron*, 3 Hill, 361; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Strooghill v. Autrey*, 1 DeG. M. & G. 635;

Shaftenbury v. Dutchess of Marlborough, 2 Myl. & K. 111; *Page v. Cooper*, 16 Beav. 400.

Lord St. Leonards, in *Strooghill v. Autrey* (*supra*), after an examination of many authorities says: "My own opinion is that, generally speaking, a power of sale 'out and out,' or for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but, that when it is for raising a particular charge, and the estate is settled, or devised subject to that charge, then it may be proper under the circumstances to raise the money by a mortgage, and the court will support it as a conditional sale, as something within the power." *Butler v. Huestis*, 68 Ill. 594; *Switzer v. Wilvers*, 24 Kan. 386.

In another line of cases we find that a power to sell is held to include a power to mortgage, upon the general theory that such a power is fairly to be inferred from the words or plain intent of the testator.

In *Loebenthal v. Raleigh*, 36 N. J. Eq. 169, a will containing the provision that "If it should seem necessary at any time to dispose of a portion of my real estate, for the payment of my debts, I hereby give my executors power to do so, either at public or private sale," was held to authorize a mortgage of the realty for the purpose of raising sufficient money to pay the debts, after applying the personal estate, the application to a court of chancery by the executors for authority to make such a mortgage being joined in by the beneficiaries under the will. This came within the principle declared by Lord St. Leonards, quoted above.

And so in a case where the testator had clothed his executors with a wide discretion in regard to selling his unproductive real estate, whenever it might seem to the interest of the estate, it was held that the executors might borrow money to improve the unproductive real estate, and might give a mortgage on the property to secure the loan. *Starr v. Moulton*, 97 Ill. 525.

In the cases of *Pennsylvania Ins. Co. v. Austin*, 42 Penn. St. 257; *Watson v. James*, 15 La. Ann. 386; *Stiefel v. Clark*, 9 Baxt. 466; *Wayne v. Middleton*, 2 Ga. 383; *Allen v. Backhouse*, 2 Ves. & B. 65; *Mills v. Banks*, 3 P. Wms. 1; *Ball v. Harris*, 4 Myl. & Cr. 264, a power to mortgage has been held fairly inferable from powers to sell or to raise portions.

In *Warner v. Connecticut Mutual Life Ins. Co.* 109 U. S. 357, it was held that where a married woman had joined with her husband in a mortgage of her real estate, to secure the payment of his debt, and subsequently devised the property to him for life, with power to mortgage the same to pay incumbrances upon it, this power authorized him only to renew the mortgage. Where a power to sell and convey real estate is determined to be only a naked power in respect to the disposition of the estate, it was held that the power could only be rightfully exercised by a sale of the estate in fee, and that even a lease of the property by the donee of the power, for a term of years was void. *Waldron v. Chasteney*, 2 Blatchf. 62.

PRICHARD vs. THOMPSON.

[95 New York, 76.]

CHARITABLE USE.—INDEFINITENESS AND UNCERTAINTY OF DEVISE.

A bequest of money to executors in trust to distribute the same "among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors may select, in such sums as they may designate, is void for indefiniteness and uncertainty.

ACTION for construction of will.

Edward H. Hawke, for appellant.

Duncan Smith, for respondents.

MILLER, J. This action was brought for the purpose of obtaining the judgment of the court as to the construction to be placed upon the tenth article of the last will and testament of William D. Thompson, deceased, and to determine to whom the income of the trust fund, therein mentioned, belongs, and to obtain the judgment of the court as to the powers and duties of the executors and trustees under the said tenth article, and for direction as to the execution of the trust thereby created in view of the refusal of the defendant and appellant, one of the said executors and trustees, to recognize the said trust as valid, and to join in or consent to its execution.

By the tenth article of the will, which is in question, the testator gave and bequeathed to his executors, or the survivors of them, "bonds and stocks amounting at their par value to the sum of \$150,000 * * * in and upon the trust that they shall distribute and apply the same to such charitable and educational uses, and in such manner as shall be specified and directed in a codicil to this my will," which codicil the testator declared he was not then prepared to make, but which he intended to make without unnecessary delay. And in case the codicil should not be executed, "then upon trust to distribute

the said sum of \$150,000 to and among such incorporated societies, organized under the laws of the State of New York, or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses, as my said executors, the survivors or survivor of them, shall select for that purpose, and in such several sums, not exceeding in any case the amount that such incorporated body is empowered by law to take and hold upon the uses aforesaid, as they, my executors, the survivors or survivor of them, shall determine. And I further direct that the selection and distribution aforesaid be made and fully completed within the life-time of the longer liver of the two persons lastly named in the fourteenth clause of this my will as my executors; and it is my expectation that the same shall be completed at any rate before the expiration of three years after my decease." The testator died without having executed any codicil to his will. The plaintiff Prichard and the defendant were the two last-named executors in the will. Several questions are made as to the validity of the bequest under the tenth paragraph of the will which has been cited. The most important of these relate to the designation of the donees who are to receive the amount to be distributed among incorporated societies within the two States named. No donees having been named specifically, the selection to be made embraced a large number of institutions within the limits prescribed, thus vesting a wide discretion in the trustees. It cannot be denied that the provision was not specific in this respect, and it is claimed that it was void by reason of indefiniteness and uncertainty in failing to designate any particular institution or any class of institutions which were to be the recipients of the testator's bounty. According to the paragraph of the will in question the distribution is to be made to incorporated societies that have authority to hold funds for charitable and educational uses. This would embrace all institutions of charity of every name and description, and all colleges, schools and institutions of learning. The number would certainly be very great and the discretion to be exercised very large and extended, imposing much responsibility, care and attention in

discriminating between so many objects organized for various purposes connected with charity and education. While the law in many instances sanctions the right of a testator to confer upon his executors or trustees the power of selecting the objects entitled to consideration in the distribution of his estate, it does not give such an unlimited and unbounded authority as would include all and every object which the testator himself might select in the free exercise of his own will, discretion and judgment. There must be some limit to the testator's power to dispose of his estate, and some certainty and definiteness in the selection of those who are to receive it by virtue of his last will and testament. He clearly would not be authorized to make a bequest empowering his executors to select institutions embracing the whole civilized world, or even within the limits of the United States. Such a disposition of his estate would unquestionably be of such an uncertain and indefinite character as to render it difficult for the courts to carry it into effect, and for that reason would not be upheld. If the testator had a right to select societies embracing a great variety of institutions, without designating any class and without restriction as to their number, within the limits of two States, then he was authorized to go beyond that without any regard whatsoever as to the extent of the territory, or the indefinite objects named in his will which might be embraced within it. The discretion invested in the trustees named is far beyond what ordinarily is conferred upon those who are selected to discharge functions of this character. The executors named are mere naked trustees with authority to distribute in their discretion. No object being designated, there is no imperative duty imposed upon them. If they are unable, or for any reason fail to perform, it is difficult to see how a court of equity could enforce a performance. It could not well control their discretion or exercise the power conferred in their place and stead or of the survivors or survivor of either of them. If they refuse to execute it, or the power remains unexecuted, it is not apparent how the court could make a selection, from the extensive range of societies referred to, of those that should receive the bequest or of the proportion in

which it should be divided. Neither could the court select individuals to perform a duty devolving upon the trustees, who are selected no doubt by reason of personal confidence in their judgment and their capacity for the task imposed.

Another difficulty presents itself as an obstacle in carrying out the trust in question. The beneficiaries referred to, consisting of every corporation within two States of the character named in the will, would be almost innumerable, and none of them could claim that any specific portion of the bequest belonged to them. Until selected by the trustees they would have no such interest as would give them a standing to compel an enforcement of the bequest. It is a well settled and established rule that where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree, the representative of the donor must prevail over the charity. (*Williams v. Williams*, 8 N. Y. 526.) Within the rule stated it is quite obvious that insuperable obstacles exist which prevent a distribution of the fund intended to be created by the testator's will, and that by reason of a want of precision and certainty in the bequest made and the difficulty in the selection of those who would be entitled to be benefited thereby, it cannot be carried into effect. No case in this State goes so far as to hold that such a bequest is valid and effectual and capable of being executed within the well established rules of law which are applicable to the doctrine of charitable uses and trusts. While the courts have gone very far in sustaining bequests for charitable and educational purposes and in upholding the proposition that a charitable gift, definite in its object and purpose, and made to a definite trustee who is to receive the fund and apply it in the manner specified, is to be maintained, although it would be void by the general rules of law because the particular objects of the gift, or the persons to be benefited by it, are uncertain, yet none of the authorities sustain the rule that, where the bequest embraces unknown beneficiaries to an unlimited extent so as to render it almost impossible to ascertain their number or character, and where no restriction as to the amount to be allowed to any of them is fixed or determined, such a bequest can be carried into effect.

The counsel for the respondent relies upon the case of *Power v. Cassidy* (79 N. Y. 602 ; 35 Am. Rep. 550) as authority for the doctrine that the bequest here made can be upheld. In that case the testator bequeathed to his executors the balance of his residuary estate, "to be divided by them among such Roman Catholic charities, institutions, schools or churches, in the city of New York, as a majority of my executrix and executors shall decide, and in such proportion as they may think proper," and it was held that the bequest could be enforced. A distinction exists between the case cited and the one at bar ; the decision in that case is based somewhat on the fact that the trusts were of such a nature that a court of equity could direct their execution. The class of beneficiaries was specially designated and confined to the limits of a single city, and to a single religious denomination, so that each one could readily be ascertained and each had an inherent right to apply to the court to sustain and enforce the bequest made. Here no class is designated ; and, as we have already intimated, if a court of equity should be called upon, or assume to take upon itself the responsibility of carrying into effect the bequest of the testator, it would be obliged to bestow upon every charitable and educational institution within the two States named a portion of the fund in question. This would be a matter of great difficulty if not impracticability, and would inevitably lead to serious embarrassment in the discharge of the duty of disposing of the fund in question. In such a contingency it would seem to be reasonable that the fund should be equally divided among all the institutions named, and thus the right of selection which was intrusted to the judgment, good sense and kindly feelings of the executors as a matter of personal confidence would be of no avail. For the reasons we have stated the case cited differs in many respects from the one under consideration, and it would be extending the authority of that case beyond what was intended or what it actually embraced to adjudicate that it covers and includes the bequests which are now the subject of consideration.

The examination which we have given to the question raised leads to the conclusion that the court below was in error,

for the reasons stated, in deciding that the tenth clause of the will was valid and effectual.

The result at which we have arrived renders it unimportant to discuss some other objections which are urged against the validity of said tenth clause of the will.

It follows from the discussion had that the judgment of the Special and that of the General Term should be reversed, and, inasmuch as the facts cannot be changed upon a new trial, the decree of the court below should be modified by directing that the tenth paragraph is void and that the bequest be paid to the defendant John B. Thompson as residuary legatee named in the testator's will. Costs of both parties to this action should be paid out of the estate.

All concur.

Judgment accordingly.

See Goodale v. Mooney, *ante*, page 1, and references in note, page 6.

CLARK vs. ATKINS.

[90 North Carolina, 629.]

BONDS INCLUDED UNDER "BANK STOCK."

Testatrix had on deposit with the Citizens' Bank of Raleigh the sum of \$1,000 and some railroad and State bonds. She owned some stock in the Merchants and Farmers' Bank of Charlotte. A bequest by her of "bank stock" in both banks, followed by a disposition of the money deposit, was held to include the bonds.

ACTION for a construction of the will of Eleanor H. Swain.

S. F. Mordecai, for executors.

Haywood & Haywood and *Gatling & Whitaker*, contra.

ASHE, J. There is no error, in our opinion, in the construc-

tion given by his honor upon the second item of the will, except as to the State and railroad bonds.

The second item reads: Bank stock in Citizens' National Bank of Raleigh, and in Merchants and Farmers' National Bank of Charlotte, with the remaining debt still due from the Kimberly estate in Buncombe county, "I leave to be equally divided between the children of my deceased daughter E. H. Atkins, receiving the interest only, until after each becoming of age."

The testatrix owned at the time of her death one thousand dollars, to her credit in the Citizens' National Bank, and she owned bonds of the North Carolina Railroad Company of the face value of \$2,500 and bonds of the State of North Carolina of the face value of \$300, which bonds were in the Citizens' Bank, and were held as a special deposit by the testatrix. She also owned ten shares of the capital stock of the Merchants and Farmers' National Bank, but she did not own at the time of her death, and never had owned, any shares of the capital stock of the Citizens' Bank.

The first question presented is, did the railroad bonds and the North Carolina State bonds pass to the children of E. H. Atkins, under the description of *bank stock in Citizens' National Bank of Raleigh*?

In the construction of wills, the intention of the testator is always held to be the only guide in its interpretation. "It is a *lex legum*, a general rule, an universal maxim, that in all cases, the design and intent of the framer, when it can be indisputably ascertained, shall prevail; *quod verba intentioni inservire debent*. And the intention may be collected either from the particular provision or the general context." (Potter's Dwaris on Statutes, 174, 175.) To the same effect is *Procter v. Pool* (4 Dev. 370), in which Chief Justice Ruffin says: "No positive rule can be laid down for ascertaining the intention of the maker of a deed or other instrument, but his intention is to be collected from the whole instrument taken together." (See, also, *Alexander v. Summey*, 66 N. C. 577; and *Lassiter v. Wood*, 63 N. C. 360.)

In looking to the general context of the will of Mrs. Swain,

it must be evident to every plain mind, unbiassed by the technical rules of construction, that it was her intention to bequeath, by the second clause of her will, the State and railroad bonds which she had on deposit in the Citizens' Bank, and that calling them "bank stock" was the result of ignorance or inadvertence. She had no bank stock, but she manifestly intended to bequeath something. What was it? It was something she had in the bank. It was not the thousand dollars she had deposited there, for she expressly mentions and disposes of that in the tenth clause of her will. The bonds then are the only other things she had in the bank, and the inference is irresistible that they were the *things* which she, by a misdescription called "bank stock," intended to bequeath.

In viewing the will in all its parts, it is evident she did not intend to die intestate as to any portion of her estate, and that she believed she had disposed of every part thereof. For in the tenth clause she directed that, "if there should be a residue of the estate not embraced in this will, but may be found in the hands of my friend, R. H. Battle, attorney, who has in part the management of my business, it will add to the closing up of my earthly affairs. * * * I have some funds in the Citizens' National Bank, one thousand dollars; after my burial expenses and medical bills are paid, should there be a balance of funds remaining and everything settled, divide between my four grandchildren."

This is the only legacy in the will directed to be divided between the four grandchildren, and it consisted of the balance of the residue of her estate, after the payment of *burial expenses* and medical bills; and she restricts the residue to the *bonds* or notes in the hands of R. H. Battle and the one thousand dollars deposited in the Citizens' Bank. It is evident, when she made the residuary bequest, that she thought she had disposed of the State and railroad bonds by the second clause of her will; and to hold that those bonds fall into the residue to be divided between her four grandchildren, would be doing violence to the intention of the testatrix.

The case lies so close to the shadowy lines of distinction between general and specific legacies, and latent and patent ambi-

guities, that very little light is to be derived from the application of the technical rules of construction. But we find the following authorities which serve to sustain the construction we have given :

In *Gallini v. Noble* (3 Mer. Chan. Rep. 690), where the testator bequeathed all his money in the Bank of England to his daughters, it appeared that he never had money in the bank, but was entitled to some 3 per cent. and 5 per cent. bank annuities, and it was held that the annuities passed. It was compared to the case of an incorrect description of the intended legatee, and to the case where leaseholds have been held to pass under the devise of lands, "there being no other property to answer the description." (*Quennell v. Turner*, 13 Beav. 240.)

In *Door v. Gray* (1 Ves. 255), where a husband bequeathed to his wife seven hundred pounds East India stock, having none, but there were seven hundred pounds bank stock to which his wife was entitled as executrix, which he afterwards transferred in his own name, Lord Hardwick held that the bank stock should go to the widow—the judge being of opinion that it was a case merely of error of description.

In *Penticost v. Ley* (J. & W. 207), a testator bequeathed one thousand pounds Long annuities, "now standing in my name or in trust for me." At the date of the will the testator had no Long annuities, but had 3 per cent. reduced annuities, and it was held that that sum passed by the bequest.

These cases, like that of the bequest of the "white horse" under the description of a black horse, were evidently sustained upon the principle of the maxim, *falsa demonstratio non nocet*.

We do not think there was any error in the directions given by his honor upon the point which constitutes the defendants' second ground of exception. It would be manifestly unjust, and could not have been intended by the testatrix, that the legatee Lula Swain should bear any part of the expenses of providing servants for the other legatees, the Atkins children.

As to the third exception, we are of opinion his honor's construction of the second item of the will, in the particular of that exception, was correct. The testatrix leaves the legacies passing by that item "to be equally divided between the chil-

dren of my deceased daughter E. H. Atkins, receiving the interest only until after each becoming of age." It is clearly a legacy to each of the children *to be paid* on his or her attaining the age of twenty-one years, receiving the interest in the meantime. Who is to pay the legacies when the legatees arrive at age, and the interest accruing in the interim? Of course, the executors. The fund remains in their hand until such time as they can execute this clause of the will by paying over to each legatee his or her share of the legacy, as they respectively arrive at the age of twenty-one years.

Our conclusion is, that the judgment of the Superior Court must be affirmed, except as to the directions of his honor with regard to the disposition of the State and railroad bonds, and we think in that there is error. Our opinion is that these bonds passed by the second clause of the will to the children of Eleanor H. Atkins, and that the judgment must be reformed in conformity to this opinion, and costs must be paid out of the residuary fund, and to that end this opinion must be certified to the Superior Court of Wake County.

Judgment accordingly.

The word "possessions" may include real estate. *Blaisdell v. Hight*, 1 Am. Prob. R. 811. So may the word "effects." *Page v. Foust*, 8 Id. 438. But not the words "all my worldly goods." *Farish v. Cook*, *infra*.

McCLOSKEY vs. GLEASON.

[56 Vermont, 264.]

LIABILITY OF ADMINISTRATOR FOR MISAPPROPRIATIONS OF AGENT.

As administrator is liable for the loss of the avails of a note misappropriated by a collection agent chosen by him, unless he can show actual necessity for the employment, the use of the best accredited agencies, and in all respects the exercise of the diligence and care of a prudent man in like circumstances.

ACTION to construe a will.

S. C. Schurtleff, for defendant.

J. A. & Geo. W. Wing, for plaintiffs.

Ross, J. The first question is in regard to the construction to be given to that portion of the will of Daniel Carpenter, deceased, of whose estate the defendant is administrator *de bonis non, cum testamento annexo*, which relates to the bequest to the plaintiff wife. It is as follows :

"After all my lawful debts are paid, I will to my wife, Heliann Carpenter, all my property, both personal and real ; but at her decease none of said property is to go to her heirs or my heirs ; but it is to be economically used at her decease in constructing a monument for us both—a family monument. I wish said monument to be of granite, and to be surrounded and guarded by a substantial fence.

"I will that in case of my wife's second marriage, my executor shall set aside four thousand dollars for the purpose of building said monument, which sum is not to be expended for any other purpose ; but in case she does not marry and needs it all for her support she is to have it."

No trustee other than an executor is named to manage the property. The testator enjoins the practice of economy upon the executor in the administration of his affairs ; and gives him instructions in regard to the construction of the family monument. The intention of the testator, if directed to the accomplishment of lawful purposes, is to govern in the construction of his will. That intention is to be gathered from all the provisions of the will. The language in which it is expressed, unless ambiguous, is to receive its natural and usual meaning. If different provisions of the will apparently conflict, such construction is to be given to them as will give effect to all the provisions, unless a clear repugnancy exists between the different provisions. General language, broad enough to pass the entire property of the legacy to the legatee, may be limited in its scope and effect by other provisions of the will. (*Richard-*

son v. *Paige*, 54 Vt. 373.) In *Smith v. Bell* (6 Pet. 68), it is held, Ch. J. Marshall delivering the opinion, that the following clause in a will—"Also I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin"—conveyed to the wife but a life-estate, and the reversion to the son, Jesse Goodwin. The property bequeathed consisted principally of slaves. Many of the cases bearing on the subject of construing apparently repugnant portions of wills are reviewed by the learned chief justice; and the general doctrine, announced and adhered to, that the intention of the testator, if ascertainable from the language of the will, when applied to his circumstances and the objects of his bounty, must govern, even if to accomplish that end a limitation has to be placed upon language that is absolute in terms. Language, apparently, giving the legatee unqualified power of disposal, has frequently been held to convey but a life-estate.

In *Upwell v. Halsey* (1 P. W. 651) the testator directed "that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body." The court observed: "As to what has been insisted on, that the wife had a power over the capital or principal sum, that is true, provided it had been necessary for her subsistence; not otherwise; so that her marriage was not a gift in law of this trust money. Let the master see how much of this personal estate has been applied for the wife's subsistence; and for the residue of that which came to the defendant, the second husband's bonds, let him account."

In *Henderson v. Blackburn* (104 Ill. 227) the will gave to the widow "all my estate, both real and personal, to have and to hold, or to dispose of so much of the same as she may need, or wish to use during her life-time. And after her death, if there is anything left, it is my will that whatever there may be

left shall be divided equally between " the testator's son and daughter, the parties to the suit. The defendant claimed the whole real estate by a deed from the testator's wife. It was held, that as it did not appear that the conveyance was necessary to supply "the need or personal use" of the widow, it conveyed no title to the defendant.

These are a few of the many cases which might be cited in which the language of the testator, broad enough to confer absolute title and power of disposal of the bequest, upon the legatee or devisee, has, by other portions of the will, been limited, and held to convey a less estate. They serve to illustrate the principle that the intention of the testator controls and limits, frequently, his language, which, if standing alone, would naturally have a wider scope, and be given a broader meaning. Applying these principles to the language of the will in contention, it is apparent that the testator did not intend to give to his wife his entire property, with the right and power of disposing of the same as she saw fit. The first clause of the bequest, "I will to my wife, Heliann Carpenter, all my property, both personal and real," is the only one in which the language used is broad enough to give her the absolute title to his estate. But this clause is followed by the qualifying clause, "at her decease none of said property is to go to her heirs or my heirs; but is to be economically used * * * in constructing a monument." The construction of the monument is left to his executor. If the widow marries, the executor is to set apart a specified sum for that purpose. If she does not marry, she is to have it all, only in case she needs it for her support. When the whole will is considered, it is quite manifest that it was the intention and expectation of the testator that the property would remain in the hands of his executor or his successor, during the life of his wife; that she was to have the use of the whole property and so much of the principal as she might need for her support, even if it absorbed the entire estate, if she remained unmarried; but so much of it as should not be needed for her support was to be used by the executor in constructing a monument "for us both," in the language of the will. In case

she remarried, she was to have the use of the entire estate during her life, and the excess of the principal above four thousand dollars. The estate has never been passed to the possession of the plaintiff wife. She has remarried. It has become the duty of the defendant to "set aside four thousand dollars for the purpose of building said monument, which sum is not to be expended for any other purpose," and to pay the balance of the principal to the plaintiff wife; and also to pay the income of the four thousand dollars annually to her during her natural life. The testator, doubtless, was aware that in case she remarried, her support would legally be cast upon her second husband, and that the necessity for using any of the principal for that purpose would cease. There is not a full sentence in the will that gives the wife, unqualifiedly, the testator's property or any portion of it, except the excess above four thousand dollars in case she remarries. To the first clause of the bequest, in which the broadest language is used, there is attached the qualification that none of it shall descend to her heirs, nor the testator's heirs; but it shall be used for a specific purpose. The last clause of the bequest, "in case she does not marry," conditions her right to use the principal, or any portion of it, upon the existence of a necessity that it should be so used to furnish her a support. The condition that if the widow remarried she should forfeit all right to have four thousand dollars of the legacy used for her support, although she might be in necessitous circumstances, was one that the testator had a legal right to make. (2 Jar. Wills, 44, n. 2, and cases cited.) The four thousand dollars, the conditional right to have which used for her support, if needed for that purpose, on her remarriage, was set apart for a specific purpose. There was, therefore, a gift over as to that sum; and the condition subsequent in regard to the remarriage, could not be regarded on the somewhat questionable authorities, *in terrorem* only. (2 Jar. Wills, *supra*; *Parsons v. Winslow*, 6 Mass. 169; *Doe v. Freeman*, 1 Term, 339.

Another contention is, whether the defendant is to account for the one thousand dollars lost through Dr. Richardson. The

main facts bearing upon this contention are, that Dr. Richardson formerly resided at Montpelier, and was a man of good repute, both financially and as a man ; that he was named by the testator as his executor and duly qualified and acted for several years, but removed to Winona, Minnesota, whereupon he resigned, and the defendant was appointed administrator *de bonis*. When he settled his account he passed over to the defendant a note for \$1,900, secured by mortgage on land near Winona. This was in December, 1867, and the note matured May 20th, 1870. The defendant, at once upon receiving it, placed the note in the hands of Dr. Richardson for collection. The money due thereon was paid to him on the maturity of the note. In the August following, Dr. Richardson sent the defendant the amount collected by him except \$1,000, for which he offered to give to the defendant a good note secured by mortgage bearing twelve per cent. interest. The defendant declined the note, asked for payment, preferring to invest the \$1,000 east. In August, 1872, the defendant consulted Joseph A. Prentiss, a lawyer at Winona, who advised him that he considered Dr. Richardson good, but that he had his property locked up in real estate which was not then salable, and advised against bringing a suit. He also consulted H. D. Morse, a business man of Winona, in January, 1874, and sought to collect the \$1,000 through him. He replied that he looked upon Dr. Richardson as responsible, and that he thought the claim could be collected in time without suits or costs ; and in a subsequent letter doubted if the doctor could give satisfactory security, and asked for further instructions. Dr. Richardson died in the summer of 1874. The claim was proved against his estate, but nothing received thereon. The defendant also received in 1873 two letters from Dr. Richardson, in which he promises to pay as soon as he could, and states that he has a large amount of real estate, which was slowly appreciating, but that money was tight and it was difficult to realize upon it ; and in the last letter he states that he had been sending money east to parties whose needs seemed to him to be greater than the Carpenter estate, but that times were looking better, and that he should begin in September to send

him money, monthly, as he made collections. This letter is dated August 25th, 1873. These letters were put in evidence by the defendant. On this contention the masters say: "We find that Gleason, in the matter of the collection of the \$1,900 note, and that part thereof that was finally lost, acted in good faith, and on his best judgment, and with ordinary care and prudence."

On these facts has the defendant legally accounted for the \$1,000, or shown that it was lost without his fault? He insists that the burden is upon the orator, to show that the loss was occasioned by his fault. As a general proposition this is true. They show that he received a good note, secured by mortgage, which was paid at maturity to him, or his agent. Showing this, it is incumbent on the defendant to give a legal excuse for not having the money received on the note; in other words, to account for the note, and the money collected thereon. His excuse, in substance, is, that nearly three years before it was due he gave the note to Dr. Richardson for collection; that he collected it, and appropriated \$1,000 of it to his own use, without the consent and against the will of the defendant; and that he continued so to hold it, for more than four years, without suit, and so far as is found, without any special effort to recover it except by writing an occasional letter, until Mr. Prentiss was applied to in August, 1872. It is not found, nor shown, that he was authorized to enforce collection. It is found that the defendant sought to collect the \$1,000 by Mr. Morse early in 1874. It is contended that the finding of the masters that the defendant "acted in good faith, and on his best judgment, and with ordinary care and prudence," is a legal excuse. But we apprehend, that lying back of this finding, are the questions, when and under what circumstances an executor, or administrator, may properly part with property, as evidences of property of the estate? and how far, and when, is he responsible for the default or misfeasance of the person to whom he intrusts a portion of the property of the estate for a particular purpose? The answer to be given to these questions is important to the defendant, to the orators, to the trustees and *cestuis que trust*, generally. So far as we are aware, they

are now first presented for the decision of this court. We have endeavored to give them the careful consideration which their importance deserves. The defendant held this debt to collect for the estate when due. Persons undertaking to collect debts, as a general proposition, are responsible for the negligence, misdoings, and defaults of their agents, or attorneys, in making the collections and paying over the money. (Whar. Neg. §§ 532, n. 6, 753, n. 3; Whar. Ag. §§ 275, 276, 544, n. 6; *Floyd v. Naugle*, 3 Atk. 568; *Whitney v. Mer. U. Ex. Co.* 104 Mass. 152; *Am. Ex. Co. v. Haise*, 21 Ind. 4; *Riddle v. Hoffman's Ex.* 3 P. & W. [Pa.] 224; *Simmans v. Rose*, 31 Beav. 1; *Bradstreet v. Everson*, 72 Penn. St. 124, and cases cited in the opinion by Agnew, J.) He clearly shows that collection agencies and attorneys who receive a debt for collection, and who intrust the collection thereof to a sub-agent, or another attorney, are responsible for the misapplication of the money collected by such sub-agent or other attorney. A distinction is made in the cases between receiving a debt for collection, and receiving it to forward for collection. In the latter case he is not responsible, if he has used due diligence, care and prudence in selecting a reliable, skillful and responsible sub-agent or other attorney to whom he forwards the claim for collection. But he must, to exonerate himself, exercise this degree of diligence, care and prudence in making the selection at the time he forwards the claim. 1 Perry on Trusts states the same doctrine as applicable to trustees and executors. Sec. 441: "But if a trustee employs an agent and the agent steals or appropriates the property intrusted to him, the trustee will be held responsible; that is, the trustee is not responsible for the crimes of strangers, but is responsible for the criminal acts of agents employed by him about the trust fund."

Sec. 444. * * * "Or if they (the trustees) place their papers and receipts in the hands of their solicitor, so that he can receive their money, and misapply it, or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied, * * * or if the money is left improperly or unadvisedly in the hands of a co-executor or co-

trustee so that he has an opportunity to misapply it; all the trustees will be responsible for any loss that may occur to the trust fund, so trustees are liable for the attorneys and solicitors whom they employ."

Sec. 463. "Trustees must personally see to it that the security is forthcoming upon parting with the money; as when they allowed their solicitor to receive the money upon representation that the mortgage was ready, and there was no mortgage, and the solicitor misapplied the money, the trustees were held liable to make up the loss; when money is paid in to a banker or broker, for investment, the trustees must see that the investment is made at once and the securities taken in proper form, or they will be liable for any loss that may happen, or when money is suffered to remain in the hands of third persons unnecessarily and a loss happens, the trustees must make it up."

The principles thus announced are supported by the citation of numerous authorities, as shown in the note. A brief examination of some of those cited, will show more clearly the grounds and extent of the responsibility of trustees for the negligence and misdoings of their solicitors.

In *Ghost v. Waller* (9 Beav. 497), by a marriage settlement trustees held property with power to sell and invest the proceeds for certain trusts in which the wife finally became sole *cestui que trust*. The wife and trustee joined in a sale of the estate, but the trustee alone receipted for the purchase-money. He handed the conveyance to the solicitor of the wife, who completed the sale, received and retained the purchase-money, which was lost by his subsequent bankruptcy. Lord Langdale, Master of the Rolls, says: "Cases of this kind where the court has to determine which of the two innocent parties is to sustain a loss, must be attended with great hardship. * * * Here the trustees, being asked to execute the conveyance and sign the receipt, did it accordingly, and placed the conveyance in the hands of Osbaldston. By that means they enabled him to receive the purchase-money. * * * I am of opinion that the money which they enabled him to receive was subject to such trusts as might arise from the settlement, and that the

trustees became liable, for they authorized the payment of the money to him, instead of taking possession of it and investing it on the trust of the settlement."

Rowland v. Witherden, 3 Macn. & G. 568. In 1838, the trustees sold some of the trust property and paid the sum realized to their solicitor to be invested on mortgage. He used the money, but represented he had made the investment, and paid to the *cestui que trust* as for the interest received on the investment to 1847, when the trustees first learned no investment had been made. The vice-chancellor dismissed the bill. Lord Chancellor Truro reversed this decision, saying: "As to the liability of the trustees, I entertain no doubt. The short result of the case is, that the trustees, instead of themselves seeing to the investment of the trust fund, delegated that duty to their solicitor, who misapplied the money."

Hanbury v. Kirkland, 6 Eng. Ch. (3 Sim.) 265. Trustees in a marriage settlement had power to change the securities with the consent of the wife. On her application two of the trustees executed a power of attorney to the third, who with his partners was the solicitor of the wife, authorizing him to sell some stocks and invest the proceeds in a 5 per cent. mortgage, which he represented he had an opportunity to do. The co-trustees gave the authority without making inquiry into the matter. The third trustee, solicitor of the wife, sold the stocks, applied the proceeds to his own use, paid the interest as of a 5 per cent. mortgage two or three years and absconded. His co-trustees were held liable, the vice-chancellor saying: "The trustees in this case have been guilty of most culpable negligence," on the ground that they had trusted to the representation of the wife and the absconding trustee without giving their personal attention to the matter.

Bestock v. Floyer, L. R. 1 Eq. 26. The trustee, having trust funds paid in, handed them to the solicitor to invest. The solicitor was of good repute and large practice, and amongst many other offices held that of steward of the manor of Beverly Water Towns. He professed to invest the sum on a mortgage of certain copyholds of that manor, and handed the trustee a bundle of papers which showed the investment, complete with

the exception of the receipt, of the tenant of the copyhold estate mortgaged for the money advanced. The interest was paid for ten years to the *cestui que trust* through the solicitor, apparently, but really *by* him, when he died. The other facts appear sufficiently in the following extract from the opinion by Sir J. Romilly, M. R. :

“The case is too clear for argument; the liability of the trustee is a matter of every-day occurrence in the court. If the trustee had handed the £400 to his solicitor, and he had not invested it at all, but simply retained it for his own use, there could be no doubt of the trustee's liability. It was argued, however, that the criminal act of the solicitor made a difference. Now, what took place was this: the solicitor, being steward of a manor, fabricated (the act did not amount to a forgery) a surrender of actual copyholds by an actual tenant on the rolls, but he did not give to his client a receipt for the money to secure which the surrender purported to be made, and, on reference to the court rolls, the whole thing is found to be a fiction. * * * This is simply the case of a person employing his servant to do an act, and the servant deceiving him, and any loss so occasioned must fall on the employer, and not on the *cestui que trust*. Of two innocent persons, therefore, one of whom must suffer by the wrongful act of the solicitor, the loss must fall on the trustee who employed him, and did not take all the precautions he might have taken against being deceived. The fund must be replaced with interest at four per cent.”

Hapgood v. Parkin, L. R. 11 Eq. 74. The investment was made by the solicitor of the trustee in 1857. He had an abstract of the mortgage premises to 1855. He did not require a fresh abstract, but trusted to the statement of the solicitor for the other party, that no mortgage had been placed upon the premises in the meantime.

Lord Romilly, M. R. “This case involves, to some extent, a question of very considerable importance, which broadly stated, and without qualification, is shortly this: If trustees are defrauded, and, by reason of the fraud practiced upon them, lose part of the trust estate, does the loss fall upon them

or upon the *cestui que trust*? In *Eames v. Hickson* I held that, if a person obtained trust property from trustees by means of forgery, the loss fell on them, and not on the *cestui que trust*. Here the trustees advanced trust money on a property sufficient to cover the mortgage, if it were a first mortgage, the fact of the existence of a prior mortgage was carefully concealed from them. * * * The question is, on whom does the loss fall? First, it is material to consider the course pursued by the solicitor of the trustees. It is true his conduct is not theirs, but he is appointed by them, he is their agent for the management of the affairs of the trust, and if he misconducts himself through ignorance, or negligence, or willfully, he is answerable to the trustees, and they cannot, in my opinion, throw any of the loss thereby occasioned upon their *cestui que trust*. * * * But trustees are bound to employ competent persons, and if they do not, the loss must fall upon them. * * * Without evidence and without inquiry, they advance the money at once, obtaining only a second mortgage. * * * I use the expression, '*they do this*, because it is exactly the same, if it be done by the trustees themselves personally, or by an incompetent or negligent agent. They must, therefore, bear the loss, and not the *cestuis que trust*, whom they were appointed to protect."

These cases are recognized and approved in 2 Lead. Cas. Eq. part 2d, pp. 1756, 1766, 1767.

In 3 Will. Ex. (6th Am. ed.) p. 1921 (1817), the learned author states the same doctrine. He says: "Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hand; and consequently appointing another to receive, who will not pay, is *devastavit*." (See authorities cited in note e.) There are two authorities in that note which apparently hold that an administrator, who in good faith employs an agent in another State to collect a debt due the estate, will not be held for the appropriation by the agent of the funds collected to his own use. The case of *Christy v. McBride* (2 Ill. 75) I have

not examined. But *Ragner v. Pearsall* (3 Johns. Ch. 578), there cited, was placed by Chancellor Kent upon the peculiar circumstances of the case. The executor, whose estate was attempted to be holden in his life-time, placed certain claims, which he held as such executor, in the hands of an attorney for collection. The claims were good and well secured. Nothing was collected during the life of the executor. Some years after the attorney collected and appropriated the money to his own use and became insolvent. Those interested in the estate made no move to close it, until long after the misappropriation by the attorney, and, having obtained a judgment against the attorney, brought the bill against the executors and heirs of the original executor twelve years after his death. As the loss did not arise during the life of the executor, and considering the delay of those interested in the estate, in moving to close it up, the learned chancellor held, that the executors and heirs of the original executor were not liable for the default of the attorney. This decision rests upon the peculiar facts of the case, and does not contravene the general doctrine.

The leading cases in Equity, *supra*, 1758, and Williams' Ex. *supra*, 1923 (1819), give, as the result of all the best authorities on the subject, the opinion of Lord Cottenham in *Clough v. Bond* (3 Myl. & Cr. 496; s. c. 8 Sim. 594), in which he says: "Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care, and diligence, will not be responsible for the failure, or depreciation, of the fund in which any part of the estate may be invested, or for the insolvency, or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected may be the result, however little likely to arise from the course adopted, and however free such conduct may be from any improper motive. Thus, if he omit to sell

property when it ought to be sold, and it be afterwards lost, without any fault of his, he is liable (*Phillips v. Phillips*, Free. C. C. 11); or, if he have money due upon personal security, which, though good at the time, afterwards fails (*Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290). And the case is stronger if he be himself author of the improper investment, as upon personal security or an unauthorized fund. Thus, he is not liable upon a proper investment in the 3 per cents. for the loss occasioned by the fluctuations of that fund (*Peat v. Crane*, 2 Dick. 499, n.); but he is for the fluctuations of any unauthorized fund (*Hancom v. Allen*, 2 Dick. 498; *Howe v. Earl of Dartmouth*, 7 Ves. 137-150). So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator (*Langford v. Casgoyne*, 11 Ves. 333; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood v. Stevens*, 1 Mer. 712)."

These decisions and annunciation of principles are but a fuller exemplification of what is set forth in the decisions of this court, as the diligence, care and prudence which a prudent man would exercise under like circumstances. (*Holmes v. Bridgman*, 37 Vt. 28; *Spaulding v. Wakefield's Est.* 53 Vt. 660; *Barney v. Parsons*, 54 Vt. 623.) They require the personal attention, and active intervention of an executor in the possession, protection, security, collection and management of the estate. The result most favorable to the defendant, to be deduced, is, that an executor cannot turn the discharge of any of his duties in that behalf over to third persons, except from *actual necessity*, without making himself liable for their negligence, misconduct, and misapplication of any part of the estate, by which a loss results to the estate, and, when an actual necessity arises for the employment of another, he is

bound to select and use the best accredited agencies, and to use vigilance and prudence in selecting the agency to be used, and make the selection at the time the necessity arises. When he intrusts the discharge of any of these duties to another, in case of a loss arising therefrom, if he would exonerate himself, he takes the burden of showing the existence of an actual necessity for employing such third person, in the matters of the trust, and that he has used this measure of vigilance, care and prudence in making the selection. This is as it should be. He is selected for his supposed fitness for a careful discharge of the duties of the trust, and gives security therefore. Without showing such actual necessity and such careful selection, he cannot be heard to say, "I turned the discharge of a part of my duties over to an agent, and he has misapplied the funds, or they have been lost through his negligence." Without showing such actual necessity for using the services of another, and such care in his selection, such agent is the chosen agent of the executor, or administrator, his hand in executing the trust, answerable to him alone, and he is answerable over to the estate for any loss sustained by the employment. There would be no safety for estates upon any other basis. The careful inquiry into the fitness of the person proposed, his selection and appointment, and the requirement of security for the faithful performance of the duties of the appointment, might as well be dispensed with, if he can, at pleasure, turn the discharge of the duties over to agents and attorneys, and shield himself from responsibility for their misdeeds and negligence, in the discharge of duties cast by the appointment upon him personally. Applying these principles to the facts of the case at bar, no necessity is shown for intrusting the collection of the note, which was good and well secured, to Dr. Richardson nearly three years before the note fell due, nor is any actual necessity shown for intrusting it to any one. It is true, the debtor and security were in Minnesota. But it is not shown why the defendant might not have collected the note himself, and if not himself, through the usual accredited business agencies of banks or express companies. By selecting his agent nearly three years in

advance of any occasion to use him, and parting with the possession of the note, the defendant precluded a careful inquiry into the financial standing and fitness of Dr. Richardson for the discharge of the duty, when the note fell due. In this, at least, there was a departure from the strict line of his duty, in the employment of some one other than the usual accredited business agencies to make the collection he admitted. The masters have made no finding in regard to whether the defendant used due diligence to recover the \$1,000, eventually lost, unless included in the words "ordinary care and prudence." We do not think that this amounts to such a finding, and that, in allowing Dr. Richardson to hold the money, in defiance of right, without suit for four years, and for two years without applying to any one to aid or advise him in regard to the circumstances and intentions of Dr. Richardson, showed any such activity by the defendant, in attempting to recover the \$1,000, as amount to due diligence. The defendant had refused Dr. Richardson, as a debtor, and his proffered security. He decided that its recovery from him was necessary. In the language of Mr. Perry, in his work on Trusts (vol. I, § 440), where a collection is necessary, "It is not enough for the executor to apply for payment through an attorney; he must follow the collection actively by legal proceedings, unless he can show that such proceeding would have been futile and vain." He has not shown, nor have the masters found that active legal proceedings would have failed to have realized the money. All the communications from Dr. Richardson, Mr. Prentiss, and Mr. Morse, show the contrary. When an agent uses the money, and refuses to pay it, on demand, without asserting any right in himself to retain it, the indications are unfavorable for realization, unless most active, immediate measures are used, for its recovery. Delay under such circumstances is negligence. In this also, we think, the defendant has failed to show the existence of any such state of facts as will exonerate him from responsibility for the loss.

But it is said, in argument by the defendant's counsel, that this court is not inclined to hold trustees to the full measure

of liability established by the courts of England, and by most of the State courts of last resort, and in evidence of this contention he cites the decision of this court in *Barney v. Parsons*, 54 Vt. 623. While, under the circumstances of that case, the defendant was not held liable because he loaned a small amount of his wards' money on personal security, the learned judge who gave the opinion, gave special warning that it was not intended "to abate in the least from the strict and rigid requirements of the *fiduciary* in regard to the *cestui que trust*; or impair in any degree the protection which the law throws about him." No inclination is shown to cut loose from the safeguards and well settled rules which have been judicially established for the protection of trust estates and to launch upon the open sea of speculation and speculation which some trustees and their agents have brought to the management of trust property. It may be a hardship, in this case, to compel the defendant to make good the loss incurred through his agent Dr. Richardson, a man who is shown to have enjoyed the confidence of the testator when alive; but the well established rules governing the management of trust estates cannot be relaxed for that reason.

Parol evidence was properly admitted by the masters to show that there were \$50 less due on the Blackwell note, by reason of an unendorsed payment made to the testator, than was shown by his receipt to Richardson, with the amount of which he was charged by the Probate Court. He was entitled, when called upon to account for the trust property which he had received from the former executor, to show by parol testimony that one of the notes received by him had been partially paid to the testator, though no endorsement of the payment had been made, and for that reason he could not realize the face value of the note. The correctness of the record of the Probate Court was not involved in the trial of this issue, nor did the testimony offered have a tendency to impeach that record. Admitting that record and his receipt to be correct, the question at issue was, how much could the defendant realize on that note, when the unendorsed payment was shown to exist? He was to be charged with, and account for, whatever, in the exer-

cise of due care, prudence, and diligence, he could realize from the Blackwell note, and no more.

The defendant mingled the trust estate with his own, made no separate investment, and kept no separate account of the same, nor of the interest received thereon. He thereby made himself the debtor of the estate. When he paid anything thereon to the *cestui que trust*, he paid so much of his own debt. He was chargeable with the highest legal rate of interest on the money so intermingled, and can be allowed nothing for services in caring for the same. (*Spaulding v. Wakefield's Est.* 53 Vt. 660; *Farenell v. Steen*, 46 Vt. 678.) No other wholesome rule could be adopted. The law requires that the trustee should keep the trust estate separate, and that he shall neither make nor lose by its lawful management further than a reasonable compensation for his services. Every inducement to vary from a strict and careful performance of these duties, should be removed. Such estates most generally belong to a class who are not able to care for them themselves. But very little safety would remain for such estates if the trustee should be allowed to use them in his own business, or to employ them in his private speculations. Too many have been, and are being, ruined in that way. Too often, it is to be feared, the control of such estates are sought by persons who wish to, and do use them in their own private business or speculations. Instead of relaxing the rule charging the trustee—who so intermingles the trust estate with his own that he cannot tell what property belongs to the estate nor what gains he is making thereon—with the highest legal rate of interest, and allowing him nothing for his services, it should be made more stringent. Such intermingling is a gross betrayal of the trust, and should receive no countenance in a court of equity.

The decree of the Court of Chancery is reversed, as to the construction to be given to the will and as to the allowance to the defendant for services in caring for the trust property which he intermingled with his own, and is affirmed in other respects.

The cause is remanded, with a corresponding mandate.

Responsibility of an executor or administrator for the default of an agent.—The general rule "*delegatus non potest delegare*" is applicable, to speak generally, to the case of an executor or administrator, in respect to the delegation of his functions. Such persons are in some sense trustees, and so far as they exercise a function by virtue of especial personal fitness, or where they have been appointed, as they almost universally are, because especial trust and confidence was reposed in them by the testator or the next of kin; that is—according to the familiar rule—where the essence of their function is personal service, they cannot delegate to another the performance of such services, nor escape in any wise liability for injury or loss to the estate resulting therefrom. 2 Williams on Exec. 1645, *et seq.*; Pomeroy's Equity, § 1068; Hun v. Cary, 82 N. Y. 65; Seely v. Hills, 49 Wis. 473; Marshall v. Moore, 2 Mon. (Ky.) 69; Green v. Hanberry, 2 Brock. 403; *Ex parte* Rigley, 19 Ves. 468; Adams v. Clifton, 1 Russ. 297; Eaves v. Hickson, 80 Beav. 136.

This rule, however, does not, it is clear, prohibit an executor or administrator from employing an agent to perform merely ministerial acts. It is proper, for example, to employ stewards or managers of an estate for any matter strictly ministerial, and so, of course, clerks, book-keepers and the like. And so in any administrative matter, the executor or administrator may act through an agent, whenever such a mode of dealing is in accordance with the ordinary course of business. Wren v. Kirton, 11 Ves. 377; Clough v. Bond, 8 My. & Cr. 490; Hawley v. James, 5 Paige, 318, 487; Leggett v. Hunter, 19 N. Y. 455.

In a proper case counsel should be employed, and when expense on this score has been judiciously incurred, reasonable fees should be allowed (Chapline v. Moore, 7 Mon. 166); and likewise banks and bankers may be employed in the usual course of business, in the collection of debts and the care of funds (Hun v. Cary, 82 N. Y. 65), and for the default of agents of this character, when properly chosen and not improperly trusted, the executor will not be responsible. Churchill v. Hobson, 1 P. Wms. 243; Knight v. Lord Plymouth, 3 Atk. 480; *Ex parte* Belchier, Ambl. 219; Adams v. Claxton, 6 Ves. 236; Calhoun's Estate, 6 Watts (Penn.), 185; Christy v. McBride, 2 Ill. 75; Williams on Exec. 1647.

For the amount of care and diligence required of the executor in this respect see Pomeroy's Equity, § 1070, and the note, where many authorities are collected.

Mr. Justice Sharswood's famous opinion in the case of Spring's Appeal, 71 Penn. St. 11, in which "gross negligence" is declared to be the measure of liability in these cases, has been very properly criticised. It is now, perhaps, universally agreed, that even an uncompensated mandatary must exercise at all times ordinary care, may under peculiar circumstances be bound to exercise even great care, and is always obliged to use all the care and skill which he actually possesses in the ordinary discharge of his

duties. Upon every consideration of principle, as well as upon authority, the same rule must be applied to executors and administrators. *Southall v. Taylor*, 14 Gratt. 269; *Smith v. Hurd*, 16 Miss. 682; 8 Wait's Actions and Defenses, 255, 256.

But an administrator who permits an attorney to retain in his hands for several years, money of the estate collected by him, without any effort to collect it from such attorney, is chargeable with the money on motion of any party in interest. *Abercrombie v. Skinner*, 42 Ala. 683; *Green v. Hanberry*, 2 Brock. 403.

And in Kentucky it is held, that an executor is liable for money and interest belonging to the estate collected for him by an agent out of the State, even though he never received the money from the agent. *Marshall v. Moore*, 2 Mon. 69.

The result of all the better authority on this subject is thus stated by Lord Cottingham in his judgment in the case of *Clough v. Bond* (8 My. & Cr. 496): "Although a personal representative acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure, or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities not authorized, or be put within control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."

Where, by the terms of the will, or by necessary implication, it devolves upon the personal representatives to carry on the business of the deceased person, the liability of such personal representatives, when acting in this capacity for the acts and defaults of agents, is somewhat modified. Upon this point see the case of *Brasfield v. French*, 59 Miss. 682; s. c. 2 Am. Prob. R. 607, and the note thereto at page 618.

For the liability of one executor for the miscarriage and defaults of a co-executor, acting as agent, see the case of *McKim v. Aulbach*, 130 Mass. 481; s. c. 2 Am. Prob. R. 252, and the note thereto at page 256.

CROSSMAN vs. CROSSMAN.

[95 New York, 145.]

PROOF OF WILL EXECUTED IN DUPLICATE.—INTERLINEATIONS IN WILL.

Where a will is executed in duplicate both parts need not be probated, but both may be required to be exhibited to the court.

Where an interlineation in a duplicate will, not offered for probate, is noted above the attestation clause, and is necessary to make it a counterpart of the other will, there is no presumption that the alteration is fraudulent.

APPLICATION to revoke the probate of a will.

Henry L. Clinton, for appellants. .

H. W. Bookstaver and *James R. Steers, Jr.*, for respondents.

EARL, J. Henry Crossman, the testator, died in January, 1881, leaving a will executed in duplicate. The duplicates were executed at the same time, with the same subscribing witnesses, and contained the same provisions, and the same language. One of the duplicates was produced before the surrogate, and was duly proved and admitted to probate, January 28, 1881. Within a year thereafter several of the heirs and next of kin of the testator filed allegations against the validity of the will, the competency of its proof, and the mental capacity of the testator, under the provisions of the Code of Civil Procedure (§§ 2347-2653). On the trial of these allegations before the surrogate, the proponents produced their testimony in support of the will and rested. Among their proofs was the duplicate copy of the will executed by the testator, which they offered in evidence for the purpose of showing that it was identical with the will proved, and that there had been no revocation of the will, but not for the purpose of having it admitted to probate as a will. The counsel for the contestants objected to the proof on the ground that the alleged duplicate was not admissible in evidence for the purposes specified, or for either of them, and also upon the

ground that it was inadmissible in evidence for any purpose whatever. The surrogate admitted the will in evidence for the limited purpose for which it was offered, but not, as he stated, "with the idea that it can be admitted to probate in this proceeding, that question being reserved for future consideration, if it be raised." The counsel for proponents offered to file with the court the duplicate will, and the counsel for the contestants objected, and the duplicate was thereupon put in evidence. After the proponents had rested their case the contestants moved that the probate of the will be revoked on the ground "that it appeared in evidence before the surrogate that at the time the paper, admitted to probate as a will of the said Henry Crossman, deceased, was executed, another paper, claimed to be a testamentary instrument, was executed by him at one and the same time; that the said two testamentary papers were signed by the alleged testator at one and the same time, there having been no separate execution of either of said alleged testamentary papers, and that only a part of the alleged last will and testament of Henry Crossman, deceased, had been admitted to probate." The motion was denied by the surrogate, and, after hearing all the evidence offered by the parties, he made a decree dismissing the allegations of the contestants and affirming the original probate. The contestants appealed from his decree to the General Term of the Supreme Court, where it was affirmed, and they then appealed to this court, and here rely upon several allegations of error which will be noticed.

The contestants claim that, as these duplicates were executed at the same time by the testator, as his last will and testament, it was necessary for the proponents to offer both for probate at the same time, and to have an adjudication by the surrogate upon both. It is undoubtedly true that where two testamentary papers are executed at the same time, with the formalities required by law, they must be taken together to constitute the will of the testator. If the two papers contain different provisions, the one making bequests or devises not contained in the other, then both must be proved and admitted to probate, and both constitute, when read together, the will of the testa-

tor, as if all the provisions of both were contained in one instrument. (*In the Matter of Forman's Will*, 54 Barb. 274.) This is only a branch of the general rule applicable to all written instruments, relating to the same transaction, executed at the same time, for the purpose of expressing the intention of the parties in reference thereto. All the instruments in such cases set forth the transaction, and embody the intention of the parties, and they must always be read together. But where an agreement is reduced to writing in duplicates, each being exactly like the other, then there can be no reason to require a party, in proving such an instrument, to produce both. It is very common to execute leases and other instruments in duplicates, each party having one, and where they are precisely alike either party can come into court and produce the duplicate which he has, and prove it; and he need not prove or cause the production of the other. So, if the same party has duplicate instruments executed for his own benefit and safety, each duplicate expresses the entire agreement of the parties, and either may be proved without the other. The same rule must be applicable to wills. Where the duplicates are exactly alike, each expresses and contains the will of the testator; and either may be proved and admitted to probate without the other. There can be no conceivable reason for proving both, or for having both admitted to probate; and no authority in this country or England has been found which hold that in such a case it is necessary that both should be proved or admitted to probate. The proponents of either duplicate can undoubtedly be required to produce the other, so that both may be before the court for inspection, that it may be seen whether they are precisely alike, or whether there has been any revocation. But when it appears that they are alike, and that there has been no revocation, then it would be quite an idle ceremony to prove both, or to admit both to probate. Numerous cases were cited by the learned counsel for the contestants, holding that where a will is executed in duplicates a revocation of one according to law *animo revocandi* is a revocation of both. As each contains the will of the testator, a revocation of either is a revocation of his will, and thus revokes both. The following

are some of the authorities cited: 1 Williams on Executors, 154; 1 Redfield on Wills, 305; 2 Greenl. Ev. § 682; 1 Jarm. on Wills, 296, 297; *Hubbard v. Alexander*, L. R. 3 Ch. Div. 738; *Doe v. Strickland*, 8 Com. Bench, 724; *O'Neill v. Farr*, 1 Richardson L. R. (S. C.) 80. None of the cases give any countenance to the idea that both duplicates must be admitted to probate. It does not take the two duplicates to express the will of the testator, but his will entire is found in each. In this case, before the surrogate, all was done which is required by any rule of law or even of prudence. The duplicate not probated was produced, proved and filed with the surrogate. In *Odenwaelder v. Schorr* (8 Mo. Ap. R. 458), where a will was executed in duplicates at the same time, just as this was, it was held that both were the same will, not that it took both papers to make the will of the testator, and that it was immaterial which was proved. The judge writing the opinion said: "Both papers, if executed at all, were executed at the same time, with the same intention, and are word for word the same. It is therefore immaterial which is proved. They are the same, and each of them, if a will at all, is the last will of the deceased."

The objection at this stage of the case, that both wills were not admitted to probate, is quite technical, as the contestants upon the trial before the surrogate, when the duplicate was produced, strenuously objected to its reception in evidence for any purpose whatever. If they had desired to have it admitted to probate with the other duplicate, or to have had the surrogate adjudicate upon it with the other duplicate, he would doubtless have done so, and was prevented from doing so mainly, if not exclusively, upon their objection.

But it is also strenuously objected that section 2614 of the Code was not complied with in the petition presented to the surrogate for probate of the will. That section provides that the proponents may present to the surrogate having jurisdiction a written petition duly verified, "describing the will," setting forth the facts upon which the jurisdiction of the court to grant probate thereof depends, and praying that the will may be proved, and that the persons specified may be cited to

attend the probate thereof. The objection made is that the surrogate did not obtain jurisdiction to prove this will because the petition failed to describe it. In the petition it is stated that the last will and testament related to both real and personal estate, bore date the 29th day of November, 1879, and was signed by the witnesses, naming them ; and one of the executors was also named. That was certainly a description of the will, sufficient to give the surrogate jurisdiction. Whether it should have been fuller, or more particular, was undoubtedly for him to determine. He could have required, when the petition was filed with him, that it should be made more certain and definite in reference to the will. He might have required the petition to state whether there was or was not a duplicate, and other facts pertaining to the will. The claim of the contestants is that the petition should have described the will as executed in duplicates ; but that was not essential. There was but one will, whether it existed in one or two papers, or more, and that will was executed at one date ; there were but two witnesses to it, and it related to real and personal estate. It was the precise will described, and whether it was expressed in one or many papers it was unnecessary to mention in the petition. That was ample as a basis for the proceedings taken in the surrogate's court. As soon as it is brought to the attention of the surrogate that there are duplicates of a will presented to him for probate, it is proper that he should require both duplicates to be presented, not for the purpose of admitting both as separate instruments to probate, but that he may be assured whether the will has been revoked, and whether each completely contains the will of the testator.

In the duplicate will there was an interlineation of the name of one of the executors which had apparently been left out in copying, and the interlineation was noted at the bottom of the will before the attestation clause : and it was there said that the interlineation was made before the execution. The interlineation was necessary to make the two duplicates precisely alike. The claim on the part of the contestants is that the law presumes that this interlineation was made after execution, and hence that without some explanatory evidence it would

have to be held that these were not duplicates; that while the duplicate admitted to probate contains three executors, the one not admitted to probate contains but two. But we do not so understand the law in this State. Where an interlineation, fair upon the face of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument. But here the interlineation was noted at the bottom of the instrument before the attestation clause; and so too the interlineation was necessary to make it a duplicate, which it was evidently intended to be, as the papers were marked on the back "done in duplicate." Taking all these circumstances, there was sufficient to cast the burden upon the contestants to show that the interlineation was fraudulent and unauthorized.

In 1 Greenleaf (§ 564) it is said: "If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion; and if it appears in the same handwriting and ink with the body of the instrument, it may suffice." And, again, "generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument." In *Speake v. United States* (9 Cranch, 37), Story, J., says: "The fact that there is an erasure or interlineation apparent on the face of the deed does not, of itself, avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant." In *Bailey v. Taylor* (11 Conn. 531), it was held "that where there is an erasure or alteration in an instrument under which a party derives his title, and the adverse party claims that such erasure or alteration was improperly made, the jury are, from all the circumstances before them, to determine whether the instrument is thereby rendered invalid."

Here, from all the circumstances, it was, at least, for the surrogate to determine whether this interlineation was made before or after execution; and in making that determination he was bound to consider the handwriting, the color of the ink, the manner of the interlineation, the fact that it was noted

at the bottom of the instrument, and that it was made to correspond with the other duplicate. Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court, in deciding whether the alterations were made before execution or not. Here there was at least enough, if any evidence under the circumstances was required, to call for the judgment of the surrogate, and his decision must be final.

The subscribing witnesses to these duplicates testified to all the facts necessary to their admission to probate, and whether there was anything in their evidence or their appearance to shake their credibility, or cast doubt upon their evidence, was for the surrogate to determine. We cannot therefore review his decision upon the evidence. His finding thereon concludes us.

We have now noticed the most material allegations of error made by the contestants against the judgment appealed from, and are of opinion that none of them are well founded, and that it should be affirmed with costs.

All concur.

Judgment affirmed.

BAKER'S APPEAL.

[107 Pennsylvania State, 381.]

SIGNING AT "END OF" WILL.—DOCUMENT MADE PART OF WILL.

A signature by testator at the end of the third page of a will consisting of four consecutive pages, is a signature "at the end thereof" if it be in fact at the end of the will, according to such connection and arrangement of the pages as the inherent sense of the instrument requires.

To make an extraneous document part of a will, it must be clearly referred to therein, and the testator's intention cannot be shown by parol proofs.

PROCEEDINGS to probate a will.

The opinion states the case.

Boyd Crumrine, J. W. & A. Donnan, for appellant.

M. C. Acheson and *A. W. Acheson*, for appellees.

CLARK, J. The sixth section of the Act of 8th April, 1833, P. L. 249, provides that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him, at the end thereof," etc. The construction which had been previously given to the Act of 1705, made this provision necessary; the plain purpose of the Legislature, in requiring the signature of the testator to be written at the end of the will, was to assimilate wills, in the mode of their execution, to other instruments for the transmission of title, to furnish a more certain and satisfactory means of authentication, and thus to distinguish what might be mere incomplete memoranda from that which certainly declared the full and final purposes of the testator respecting his property. That this was, at least, the primary and principal object of the statute of 1833, is abundantly shown, not only in the report of the commissioners (Parke & J. 874), but in numerous decisions of this court since its passage. (*Strickler v. Groves*, 5 Wharton, 385; *Hays v. Harden*, 6 Barr. 409.) It is the *animus testandi*, therefore,

which is manifested by the testator's signature to a will, and unless signing be prevented by an absolute inability, the fact of a completed testamentary disposition cannot otherwise appear.

The will of George Baker is commenced upon the first and is formally concluded upon the third page of a folio of foolscap paper. The fourth page of the paper, however, contains another and further testamentary provision, and, as the signature to the will is at the end of what is written on the third page, it is urged, on the one side, that it is not signed, according to the statutory requirement, at the end thereof; on the other side, it is contended that what is written on the fourth page is, by clear reference, incorporated into the body of the will, and that, although the signature is not at the end of the writing, in point of space, yet if the item on the fourth page be drawn into its appropriate and clearly intended connection, on the third, the signature will then appear at the end of the will in point of fact.

It will not, we think, be seriously questioned notwithstanding the provisions of the Act of 1833, that any relevant paper or writing, attached or detached, if there be no reasonable question as to its identity, or of its existence at the execution of a will, may be so referred to therein as thereby to become incorporated with the provisions. No case in Pennsylvania has been cited by counsel, with the exception, perhaps, of *Hauberger v. Root* (6 W. & S. 437), in which this rule is expressly asserted, nor, in the somewhat hasty search we have made, do we find any in which the precise point is presented, but in England, and in the courts of some of the States, under similar statutes, the doctrine is distinctly declared.

In *Habergam v. Vincent* (2 Vesey, Jr. 223), which was a case decided under the Statute of Frauds, Wilson, J., sitting with Lord Chancellor Loughborough, says: "I believe it is true, and I have found no case to the contrary, that if a testator in his will refer expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it,

because words of relation have a stronger operation than any other." This case was followed *In re Countess of Durham* (3 Curteis, 366), and in many other cases, both in the civil and ecclesiastical courts of England, and it cannot be doubted that such was the rule in the authentication and probate of wills, under the Statute of Frauds. By the statutes of 7 Will. IV, and 1 Vict. c. 26, however, all previous provisions as to execution and attestation of wills were repealed, and it was thereby enacted that no will should be valid, unless in writing, and executed as therein provided, and one of the requisites was, that it should be signed, at the foot or end thereof, by the testator, or by some other person in his presence and by his direction. In *Willis v. Lowe* (5 Notes of Cases, 428) and in *Smee v. Bryer* (6 Moore's P. C. C. 404), however, it was held that the signature must be so affixed at the end of the will, as to leave no blank space for any interpolation between the end of the will and the signature. This was found to produce such extensive injustice that, by the statute 15 and 16 Vict. c. 24, the Legislature interfered to alter the law so established, but in this amendatory statute it is expressly provided, that no signature shall be operative, to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction inserted after the signature shall be made. Upon these provisions of the statute law of England, the case of *Allen v. Maddock* (11 Moore's Privy C. C. 426) was decided; in that case, after an extended reference to all the English authorities, and a full discussion of the subject, it was held that an unattested paper, which would have been incorporated in an attested will or codicil, executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act (1 Vict. c. 26). That where there is a reference in a duly executed testamentary instrument to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence as to its identity, and such parol evidence is not excluded by the 1 Vict. c. 26. The judgment in *Allen v. Maddock* was deliv-

ered by Lord Kingsdown, who says: "It was not contended in this case, nor, so far as we are aware, has it been contended in any case, since the Wills Act of 1837 (1 Vict.), that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil; but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid?" The doctrine declared in *Allen v. Maddock* has not, we believe, in any respect been modified, changed or doubted. It is followed in many subsequent cases, and is frequently referred to as containing a clear and elaborate exposition of the law on the subject. (*In re Almosnino*, 29 L. J. P. 46; *In re Ebenezer White*, 30 L. J. P. 55; *In re Birt*, 24 L. T. R. 142.)

In New York the Revised Statutes, *inter alia*, required that every last will and testament of real and personal property, should be subscribed by the testator, at the end thereof. In *Tonnel v. Hall* (4 Constock, 140) a will was written on several annexed sheets of paper, and was duly executed; a copy of a map was upon the last of the sheets composing the instruments; it was referred to in the will as being annexed, and for the description and designation of the several lots devised, but it was not signed by the testator, nor attested by the witnesses. The Court of Appeals held that where a will, otherwise properly executed, refers to another paper already written, and so describes it as to leave no doubt of its identity, such paper makes part of the will, although it be not subscribed or even attached. It was contended in the argument of counsel in that case, that such a sheet annexed must be considered as the beginning or the end of the instrument, merely in reference to its local annexation without regard to the contents of the writing to which it is annexed, but Jewett, J., delivering the opinion of the court, says: "I cannot agree that such a circumstance can have the effect to constitute the paper referred to the beginning or end of any instrument, in the body of which reference is made to it or its contents, whether annexed in fact or not. If the map on file in the register's office, or a reduced copy of it annexed, may be treated as a

part of the instrument, and I think it may (*Habergham v. Vincent*, 2 Vesey, Jr. 228; *Bond v. Seawell*, 3 Burr. 1775; *Wilkinson v. Adam*, 1 Vesey & Beames, 445), its contents must be incorporated, and distributed in it, to the extent of the several references made to it at the places where made; and thus the contents of the paper, to which the instrument refers, will be deemed constructively inserted before the point is reached where the subscription by the decedent and signing by witnesses are made." We may also refer to similar rulings upon the same point in *Loring v. Sumner*, 23 Pick. 98; *Wilbar v. Smith*, 5 Allen, 194; *Johnson v. Clarkson*, 3 Rich. Eq. (S. C.) 305; *Chambers v. McDaniel*, 6 Iredell (N. C.), 226; *Phelps v. Robbins*, 40 Conn. 250; *Crosby v. Mason*, 32 Conn. 482. Mr. Redfield, in his treatise on the Law of Wills, page 264, after a discussion of the authorities, English and American, says: "the cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may, nevertheless, adopt an existing paper by reference. And this is true of others, soon to be referred to, many of which were decided during the existence of statutes requiring such formalities, so that we cannot escape from the force of these cases by supposing they had reference exclusively to wills of personal estate, when no particular formalities were required under the earlier English statutes."

In our own State we find no case at variance with the doctrine of the cases stated; the rulings of this court on questions similar in effect and preliminary in their nature, to that under consideration, have, in every instance, been in conformity with the views here expressed. In *Ginder v. Farnum* (10 Barr, 98) it was held, that where a will is written on several sheets of paper fastened together with a string, proof by two witnesses of the signature of the testator, at the end thereof, is sufficient; that it is the signature, not the *factum* or body of the will which is to be established by two witnesses, and whether there has been any subsequent or fraudulent interpolation, is for the jury, to be determined as other cases. In *Wikoff's Appeal* (3 Harris, 281), following the *Earl of Essex's*

Case (1 Show. 69), it was held, that a will may be made on distinct pieces of paper ; that it is sufficient if they are connected by their internal sense, and that even if there be some confusion in the order of their arrangement, when fastened together, they are to be read according to their coherence or adaptation of parts. In *Fosselman v. Elder* (2 Out. 159) it was held that where the name and designation of the beneficial party was written, not in the body of the codicil but upon the face of an envelope in which it was found, that the inscription on the envelope should be read as a preface to, and in connection with, the paper inclosed therein, and that they together constituted a valid testamentary disposition. Thus the general principle has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio : there is no law which binds him in this respect ; he may begin upon the fourth page of the folio and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second. In whatever order of pages it may be written, however, it is to be read, as in *Wikoff's Appeal*, according to their internal sense, their coherence, or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will ; it cannot be established by extrinsic proof. Whilst, therefore, the end of the writing in point of space may in most cases be taken at the end of the disposition, it does not follow that in all cases the signature must, of necessity, be there written, if it be written at the end of the will, according to such connection and arrangement of the pages or sheets, as the obviously inherent sense of the instrument requires.

Where, however, the continuity of a writing otherwise complete is attempted to be broken by the insertion into it of a clause or paragraph, written upon the same or a different page or sheet, the clause to be inserted must be plainly referred to and be susceptible also of certain identification. The reference

must, as we have already shown, be complete in the body of the will. The testator's intention cannot otherwise appear; it cannot appear by extrinsic proof; but the identification of that which is sought to be inserted in the nature of the case, may be the subject of extraneous proof.

A plain distinction is to be drawn between the case at bar and that of *Hays v. Harden* (5 Barr, 409); in that case there was no reference whatever in the paper purporting to be the will of John Hays to the clause which followed; there was no word or mark in the body of the will indicating any intention of the testator at the time of execution that the appended, unattested clause should be drawn to and inserted at any designated place.

Referring then to the will of George Baker, we see that the several items contained in it are, in their order, from the beginning to the end of the disposition consecutively numbered in Roman numerals; at the 4th item we find the following:—

“4. I give and bequeath to David S. Baker, our son, two hundred—see next page.”

The erasures in this 4th item are presumed to have been made before the signing and attestation, but they have some significance in this inquiry, inasmuch as the subject of the devise to David S. Baker is the only matter erased; the numeral “4,” and the name of David S. Baker, the beneficial party under it, remain, a fact which is entirely consistent with the idea that the error to be corrected by the erasure was as to the thing devised. The words which are not erased contain a clear reference to something to be found on the next page, something which is to constitute part of his will, otherwise the reference in that connection is without meaning and something to be inserted at the place of the reference. This is as apparent as if it had been fully expressed in as many words.

In *The Goods of Birt* (24 L. T. R. 142) the will of Charles James Birt, after a devise to the testator's wife for life, contained the following: “With the full understanding that the four freehold cottages, situate at Finchley, in the

county of Middlesex, and called by name, and known as Nos. 1, 2, 3 and 4 Arlington Cottages, * (see over, C. B.)”

Upon the back of the will there was written :

“* that the said four cottages, at her decease, should be given, and shall then belong to my daughters, Ellenor and Elizabeth, now the wife of Mr. Cuthbertson; and the said four houses to be her own property and under her own sole control.

CHARLES BIRT.”

It was shown, by parol, that the words on the back of the will were written there by the testator before he signed the will; they were not attested, however, by witnesses, as the English statute required; indeed, the witnesses knew nothing of it. Lord Penzance, in admitting this will to probate, says: “I have no hesitation in saying, that the words written at the back of this will ought to be included on the probate; the reason and good sense of the thing are in the same direction. The clause in the will has no meaning without these words—it is a sentence without any sense, begun but never finished. The testator, at the end of this unfinished part of the will, puts a mark, and at the back of the will he puts a corresponding mark before certain words which finish the sentence. It is obvious, therefore, that if all this was done before the will was executed, the testator intended that which was physically on the opposite of the page to be read in, as if it preceded his signature. It is, therefore, intended to be part of the will. It will be better, therefore, in construing the words of the statute, to treat these words as if they preceded the signature, although they seem to follow it.”

So, in this case, without the insertion of something, the fourth item is without meaning: “it is,” in the language of Lord Penzance, “a sentence without any sense, begun, but never finished.” It purports in the outset, as the fourth item of the will, to contain a devise or bequest to David S. Baker, but by the erasure, it is broken off abruptly, before the disposition is completed. It is apparent that, in the body of the will, there was not room for completion, and, therefore, reference is made to the next page. This reference is clear in its

purpose and specific in its terms, neither can it be mistaken. If the words "For the fourth item of this will, containing a devise to David S. Baker, see next page," had been employed, they would not convey a more specific meaning than is conveyed by the words and figures actually employed. That the testator's intention was to incorporate into his will, by insertion at the place indicated, something to be found on the next page, is perfectly apparent and obvious; no one in reading the instrument could doubt the testator's intention in this respect.

The physical annexation of the pages, taken with the uncontradicted proof, affords the clearest and most satisfactory evidence of identification. The "next page" of the folio cannot be mistaken, and, referring to it, we find a clause thereon written, in the same hand, in the form following:

"4th. I give and bequeath to our son, David S. Baker, our son, two thousand, to be paid in rotation of numbers. I give and bequeath to our grandchildren, Margaret Baker and George Baker, daughter and son of David S. Baker, five hundred dollars each, to be paid in rotation, in rotation, to Lewis J. Baker, whom I appoint guardian for the same. Also I appoint the same as guardian for G. M. Baker's two girls, Viola and Ella."

It is true that this writing contains more than a devise to David S. Baker, but this, we think, is not important, as its identification as an entirety is put beyond question. We are of opinion, therefore, that by force of the reference in the body of the will of George Baker, and the clear identification of the matter referred to, the writing on the fourth page is, *ipso facto*, drawn into the body of the will, and constitutes the fourth item or clause thereof; and although the instrument, thus formed, is not signed by the testator at the end thereof, in point of space, it is signed at the end of the will, in point of fact, which is in conformity with the requirement of the Act of 1833.

The decree of the Orphans' Court is, therefore, reversed,

and it is ordered that the decree of the register be reinstated.

Chief Justice **MERCUR** dissented.

See *Newton v. Seaman's Friend Society*, 2 Am. Prob. R. 18; *Flood v. Pragoff*, Ibid. 69; *Will of O'Neill*, Ibid. 135.

WILL OF LADD.

[60 Wisconsin, 187.]

REVOCATION.—NOT ATTESTED ACCORDING TO STATUTE.

The writing in pencil by testatrix of the words, "I revoke this will," with her signature on the outside wrapper of a will, does not meet the requirements of a statute prescribing the modes of revocation to be by burning, tearing, canceling or obliterating the will, or by a new will, or codicil, or other writing, attested as required in the execution of wills.

PROCEEDINGS to probate a will.

Wm. E. Carter and *A. R. Bushnell*, for appellant.

J. T. Mills and *John G. Clark*, for respondent.

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally eliminated more than two hundred years ago in the trial of the feigned issue in *Cole v. Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and that the widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day

a law that no written will should ever be revoked but by writing." (See notes to *Mathews v. Warner*, 4 Ves. Jr. 196; *Prince v. Hazelton*, 20 Johns. 513.) This remark and that trial led to the enactment of the statute of 29 Chas. II, "for the prevention of frauds and perjuries," in the following year. (3 St. at Large, p. 385, ch. 3.) In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in *Ash v. Abdy* (3 Swanst. 664; 4 Lives Ld. Ch. 271).

Sec. 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise Rev. Stat. § 2290, is substantially the same as that sec. 6. The statute is imperative upon the court, and is to the effect that "no will, nor any part thereof, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *canceling*, or (4) *obliterating* the same, *with the intention of revoking it*, by the testator, * * * or by some other (5) *will* or (6) *codicil* in *writing*, executed as prescribed in this chapter, or (7) by some other *writing, signed, attested, and subscribed* in the *manner provided* in this chapter *for the execution of a will*." (Rev. Stat. § 2290.)

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be *in writing* and *signed*, but also *attested* and *subscribed in the presence of the testator by two* or more competent witnesses. (Rev. Stat. § 2282.) It stands confessed that the writing in pencil was never attested or subscribed by any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter

constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page—the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing *words* disclosing an *intent to revoke*, it must be held to be a “*cancellation*” of the will, “with the intention of revoking it,” within the meaning of those words as used in the statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the statute? Would such a construction prevent “frauds and perjuries,” according to the original intention of those who enacted the statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper as was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or canceled. No interlineation was made. All that constituted the will remained intact. Every part of it remained as perfect as when it was first written. The same would have been true if the second half-sheet had

been entirely severed from the first. The only question is, whether it was canceled, within the intent of the statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the statute requires, not only the act of canceling the will itself, but that it must be done with the intention of revoking it. (*Burtenshaw v. Gilbert*, 1 Cowp. 49; *Doe v. Harris*, 6 Ad. & El. 209; *Francis v. Grover*, 5 Hare, 39; *Price v. Powell*, 3 Hurl. & N. 341; *Giles v. Warren*, 3 Eng. [Moak], 478; *White v. Casten*, 1 Jones' Law, 197; *Means v. Moore*, Harper [S. C.], 314; *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. [Moak], 633; *Swinton v. Bailey*, L. R. 4 App. Cas. 70; s. c. 33 Eng. [Moak], 48; *Evans' Appeal*, 58 Pa. St. 238.)

In *White v. Casten* (*supra*) the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, canceling, or obliterating the will itself, without the intent, is not enough. (*Burtenshaw v. Gilbert*, 1 Cowp. 52; *Francis v. Grover*, 5 Hare, 39; *Locke v. James*, 13 Law J. Exch. 186; *Elms v. Elms*, 4 Jur. [N. S.] 65; *Bigge v. Bigge*, 9 Jur. 192; *Clarke v. Scripps*, 16 Jur. 783; *Giles v. Warren*, 3 Eng. [Moak], 478.) So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, canceling, or obliterating, done to the will itself, is not enough. (*Doe v. Harris*, 6 Ad. & El. 209; *Hise v. Fincher*, 10 Ired. Law, 139; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Gains v. Gains*, 2 A. K. Marsh. 190; *Runkle v. Gates*, 11 Ind. 95; *Perjue v. Perjue*, 4 Iowa, 520; *Heirs of Blanchard v. Heirs of Blanchard*, 32 Vt. 62; *Olingan v. Mitcheltree*, 31 Pa. St. 25.)

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will, it shall have that effect. (*Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head, 164.) The case in Head was put on the ground that there was no such statute in Tennessee, and

the case in Georgia fails to refer to any statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived testator into the belief that he has in fact revoked his will, he shall be in equity held to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by statute. (But see *In re Wilson's Will*, 8 Wis. 171; *Allen v. McPherson*, 5 Beav. 469; s. c. 1 Phil. Ch. 133; s. c. 1 H. L. Cas. 191; *Gaines v. Chew*, 2 How. 619, 645; *Malin v. Malin*, 1 Wend. 625.) The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the statute. (*Kirke v. Kirke*, 4 Russ. Ch. 441, 451; *Locke v. James*, 13 Law J. Exch. 186; s. c. 11 Mees. & W. 901; *Jackson v. Holloway*, 7 Johns. 394; *Hairston v. Hairston*, 30 Miss. 303; *Lewis v. Lewis*, 2 Watts & S. 455; *In re Penniman's Will*, 20 Minn. 245; *Loughton v. Atkins*, 1 Pick. 535; *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. [Moak], 633.)

In *Kirke v. Kirke* (*supra*) the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In *Locke v. James* (*supra*) the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added,

presumably upon the same paper, the following memorandum or codicil to his will, *signed by him in the presence of one witness only*: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter E. J. and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N.;"—and Parke, B., speaking for the court, said that the "rent-charge of £600 per annum, created by the will, duly executed and attested, * * * has not been canceled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore *cannot even be looked at*, so far as the real estate is concerned."

In *Jackson v. Holloway* (*supra*) the testator, after having erased certain words and interlined others in place of them, and "at the same time *indorsed on the will* an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of *two* persons, who also signed the same as witnesses in his presence. But because there were not *three* instead of *two* witnesses, as required by the statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In *Lewis v. Lewis* (*supra*) the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Laughton v. Atkins* (*supra*) it was strongly intimated, if not held, that the written instrument containing words of revocation must itself be admitted to probate to have that effect.

In *Cheese v. Lovejoy* (*supra*) the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English statute, were not satisfied. But that statute does not contain the words "canceling or obliterating," like ours, and ours does not contain the word "destroy-

ing," like theirs ; and hence the case is distinguishable. But in the more recent case of *Swinton v. Bailey* (*supra*), the will was made prior to the statute of Victoria, and the case was decided under the old statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans' Appeal* (58 Pa. St. 238). In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. Then followed the attesting clause and the signatures of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible ; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "canceled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "canceled" written beneath it. Independent of the writing of the word "canceled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testator of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. (*In re Cooke*, 5 Notes Cas. 390 ; *Price v. Powell*, 3 Hurl. & N. 341 ; *In re Simpson*, 5 Jur. [N. S.] 1366 ; *In re James*, 7 Jur. [N. S.] 52 ; *In re Gullon*, 4 Jur. [N. S.] 196 ; *Avery v. Pixley*, 4 Mass. 460 ; *Mence v. Mence*, 18 Ves. Jr. 348.) The case of *Woodfill v. Patton* (76 Ind. 375),

cited by counsel, was under a different statute, and hence is not applicable. The same is true of the recent case of *Lovell v. Quitman* (88 N. Y. 377). See *Gay v. Gay* (60 Iowa, 415), which was also under a different statute.

The learned judge writing the opinion in *Evans' Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect [revocation], it must itself be complete, executed and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. * * * Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "canceled," written thereon, and said, "*I think* a repeal [a revocation of the will] is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for *himself*, and not for the court, and, as it would seem, in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing," unless it "be complete, executed and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. (*Lewis v. Lewis, supra.*) True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will itself remained intact. In this respect it differed from the

case now before us." That distinguishing element, even if it were sound, would distinguish *Evans' Appeal* from the case before us, and make *Lewis v. Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner v. Warner's Estate* (37 Vt. 356), where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, just below some of the writing, so that it could not be separated from it, the words "This will is hereby canceled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was canceled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signatures of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some of the best adjudicated cases. Besides, the case is condemned by one of our ablest text-writers on the subject. (1 Redf. on Wills [4th ed.], 318.) The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "*intention*" of revoking the will. It is the language—the expression by written words alone—which is thus sought to be made effectual; whereas the statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in *Evans' Appeal* (*supra*), and here repeated, to the effect that the word "canceling" in the statute is used in the same sense as canceling notes,

bonds, or other written instruments, is plausible, but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by statute, and the mode of revoking wills is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c., fixed by statute, furnishes no ground for holding that a will, though not included in such statutes, may also be canceled in the same way. Our statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. (*Jackson v. Kniffen*, 2 Johns. 31; *Waterman v. Whitney*, 11 N. Y. 157; *Staines v. Stewart*, 8 Jur. [N. S.] 440; *Boylan v. Meeker*, 28 N. J. Law, 274; *Hargroves v. Redd*, 43 Ga. 142; *Runkle v. Gates*, 11 Ind. 95.) The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as

will appear from the well-written and able opinion of Judge Dyer in *Southworth v. Adams* (11 Biss. 256). It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, canceling, or obliterating the will before its completion, leaving the will so that its contents could still be read, that it might nevertheless be admitted to probate. (*Doe v. Perkes*, 3 Barn. & Ald. 489; *Doe v. Harris*, 6 Ad. & El. 209; *Giles v. Warren*, 3 Eng. [Moak], 478.)

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. (*Short v. Smith*, 4 East, 418; *Kirke v. Kirke*, 4 Russ. Ch. 435; *Martins v. Gardiner*, 8 Sim. 73; *Locke v. James*, 13 L. J. Exch. 186; *Jackson v. Holloway*, 7 Johns. 394; *McPherson v. Clark*, 3 Bradf. Surr. 92; *Wolf v. Bollinger*, 62 Ill. 368; *Wright v. Wright*, 5 Ind. 389; *In re Penniman's Will*, 20 Minn. 245; *Quinn v. Quinn*, 1 Thomp. & C. 437; *Wheeler v. Bent*, 7 Pick. 61.)

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

Ordered accordingly.

Revocation by an unattested writing.—Under the English statute of wills (1 Vict. Ch. 26, § 20) no unattested writing is sufficient to revoke a will which has been duly executed. The section referring to this matter provides, "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed." The statutes of wills in many of the

States of the Union contain a provision essentially similar, and it is, in general, the rule that there can be no revocation by a mere unattested writing.

In *Peck's Appeal*, 50 Conn. 562, it was held, under the Connecticut statute, that no devise shall be revoked "otherwise than by burning * * or by some other will or codicil in writing," that a will is not revoked by a subsequent will which does not expressly revoke it, and which never became operative because not found. And in Kentucky it was held, that a will duly executed was not revoked by the writing of a second will which was not duly executed (*Breathitt v. Whitaker*, 8 B. Mon. 533); nor by the erasure of the name of an executor in a properly attested will, and the insertion of another name without a publication afterwards (*Wells v. Wells*, 4 Mon. 154; but *cf.* *Tudor v. Tudor*, 17 B. Mon. 389); nor where the testator does an act of cancellation with a view to having his will immediately rewritten, and where the act of revocation and of reconstruction are intended as part of the same transaction, and the reconstruction is for some reason deferred and not completed. *Youse v. Forman*, 5 Bush, 345. See, also, *Heise v. Heise*, 31 Penn. St. 246; *Colvin v. Warford*, 20 Md. 357, 394; *Reese v. Portsmouth Probate Court*, 9 R. I. 434; *Carpenter v. Miller's Exers.* 3 West Va. 174; *Delafield v. Parrish*, 25 N. Y. 9; *Bates v. Holman*, 8 H. & Munf. 502; In the Goods of *Frazer*, L. R. 2 P. & D. 40.

In Louisiana, plainly under the influence of the law of that State which recognizes the validity of holographic wills, where a will containing many legacies, with all the legacies except four erased by pen marks, but not so as to be entirely illegible, and the clause appointing executors being likewise erased, but still legible with difficulty, and the testator's signature also being marked out, was found, there being in the margin certain additions in the testator's handwriting apparently designed for a new will, it was held that the revocation of the original will was complete. *Mühs' Succession*, 35 La. Ann. 394.

Under the Iowa Code, § 2830, which contains a provision that a will may be revoked by destruction or cancellation, with intent to revoke, if such act be witnessed in the same manner as the code requires the will itself to be attested, it was held that a will was not revoked by a scroll through the signature, which in spite of the scroll was still legible, and that evidence that the testator had said that he had destroyed his will was incompetent. *Gay v. Gay*, 60 Iowa, 415; s. c. 3 Am. Prob. R. 540.

But in *Pickens v. Davis*, 134 Mass. 252, it is held that, while the cancellation of a will, in which all former wills are revoked, does not operate to revive a former will, the declarations of the testator that he meant thereby to revoke such former will are admissible.

In *Gugel v. Vollmer*, 1 Demarest (N. Y.), 484, it is held that writing the words "I pronounce this void" across a part of a will, does not revoke such part, but that the statute must be strictly complied with.

BARRY vs. LAMBERT.

[98 New York, 300.]

EXECUTOR MINGLING FUNDS OF ESTATE AND THIRD PARTY IN
LOAN.

Executors directed to keep funds invested may, when a profitable investment offers itself larger in amount than the available assets of the estate, supplement them with funds obtained from other parties.

ACTION to declare a trust in plaintiff's favor in a bond and mortgage, held by defendant as executor of Thomas Lambert.

William E. Osborn, for appellant.

N. C. Moak, for respondent.

RUGER, Ch. J. The evidence in this case, outside of the admissions of the defendant's deceased co-executrix, tended strongly to show that the plaintiff, immediately previous to January 31, 1882, delivered to Maria Lambert, defendant's co-executrix, the sum of \$2,000, in bills of the denomination of \$100 each, and on that day the defendant, with his co-executrix of the estate of Thomas Lambert, loaned \$1,800 of this identical money, together with \$6,000 belonging to the estate, and about \$200 belonging to Mrs. Lambert, in one aggregate sum of \$8,000 to Margaret Lawrence, taking back a bond and mortgage as security therefor to themselves as executors.

Outside of such declarations, however, the evidence was not entirely clear as to the particular understanding and agreement with reference to the disposition of these moneys, entered into between Mrs. Lambert and the plaintiff, when the money was delivered to her. This evidence was attempted to be supplied by proof of certain declarations, made by the deceased co-executrix, Maria Lambert, soon after the loan was made, in the presence of the plaintiff and other parties. Mrs. Lambert was at that time in feeble health, and her early death was

then anticipated. The declarations were offered to be proved by the witnesses who were present, at the time they were made, but their admission was objected to by the defendant upon the ground that the declarations of one executor were not admissible as against his associate. The objection was overruled by the court, and the evidence was received, to which ruling the defendant excepted. This exception presents the only serious question in the case.

The proof showed that Mrs. Lambert then made statements to the effect that she had received \$2,000 from the plaintiff, to make up the sum of \$8,000 loaned to Mrs. Lawrence, and that plaintiff was to have an interest in the mortgage taken as security for the loan, and to receive her share of the interest as it was paid by the mortgagor; that she intended to make an acknowledgment to that effect, either by her will, or in a separate instrument, before she died. She also stated that she expected to live until September. She in fact died in June soon after this conversation. These declarations were made by Mrs. Lambert in reply to a request on behalf of, and in the presence of the plaintiff, that she should make such a declaration or acknowledgment as, in the event of her death, would render the interest of the plaintiff in the Lawrence mortgage secure to her. Mrs. Lambert then promised to attend to it as soon as she got a little stronger, but death intervened before she was able to perform her undertaking.

Assuming for the purpose of the argument that this evidence was admissible, there can be no doubt that these facts raised a valid implied trust *in invitum* (*Haddow v. Lundy*, 59 N. Y. 320; *Newton v. Porter*, 69 Id. 137), and that the express acknowledgment made by Mrs. Lambert operated as a full and perfect declaration of trust, sufficient within the authorities to charge the property then in the hands of the executors with the obligations of the trust.

While there is no proof of any express stipulation made between the parties at the time the money was delivered, that the security for the loan was to be taken in such form as to disclose the plaintiff's interest therein, yet an understanding to the effect that the plaintiff was the owner of one-

fourth of the mortgage, and of the interest accruing thereon, must be implied, from the absence of any agreement transferring the title of the money advanced to the executors. A trust by implication arises from the use of the money according to such understanding and agreement, and, notwithstanding the security was taken in the name of the executors, equity will protect the interest of the beneficiary, and follow the property in which the money was invested, and impose a lien thereon in favor of the plaintiff to the extent of the sum belonging to her thus advanced and invested. (*Price v. Blakemore*, 6 Beav. 507; *Perry on Trusts*, § 842; *In the Matter of Frazer*, 92 N. Y. 240; *In re European Bank*, L. R. 5 Ch. App. 358; *Pennell v. Deffell*, 4 De G., M. & G. [53 Eng. Ch.] 372.)

No difficulty arises from the blending of the money of the estate with that of another person in the same loan, for the units of which it is composed being of equal value it is clearly severable and distinguishable, and sufficient data are given to enable such severance to be made. The cases above cited show numerous instances in which such a separation has been decreed. Conceding for the present that the admissions of Mrs. Lambert were incompetent to establish the facts upon which a trust *in invitum* can be decreed, it is, nevertheless, true that her statement also operated as a valid declaration of trust. It is well settled that a trust in personal property may be created by parol, and that no particular form of words is necessary for its creation, but the words or acts relied on to effect that object should be unequivocal and plainly imply that the party making them intended to divest himself of his interest in the property, and to hold it thereafter for the use and benefit of another. (*Hill on Trusts*, 130; *Martin v. Funk*, 75 N. Y. 140; *Young v. Young*, 80 Id. 438; *Willis v. Smyth*, 91 Id. 297.) This is all that is required to create a trust even as against the owner, and although he continues to retain possession of the property devoted to the trust. But when the legal title is in one party and the equitable ownership in another, it is only necessary for those facts to appear, in order to

constitute the holder a trustee for the benefit of the other. (*Pye's Case*, 18 Vesey, 140.)

The evidence, aside from the declarations in question, tended strongly to establish these facts, and a strong presumption of an intended trust might fairly be implied from the nature and surroundings of the transaction.

By the will of Thomas Lambert, his wife, Maria Lambert, was given a life-estate in all of his property, both real and personal, and his executors were directed to keep it invested during her life, and pay to her the income thereof as long as she should live. The duties of their office required the executors to seek for advantageous investments, and keep the moneys of the estate employed. It was entirely within their power, if it was not their duty, in case a profitable investment offered itself larger in amount than the available assets of the estate, to supplement them with other funds if they could be legitimately obtained from other parties. These moneys were received by Mrs. Lambert under such a contingency, and she was engaged in the lawful and legitimate performance of her duties as an executrix when she received and invested them.

There is nothing in the office or obligations of executors that precludes them from acting as trustees upon other trusts, and for other beneficiaries, if the transaction is not inconsistent with the duties which they owe as executors. Neither will that fact subject property, thus held by them in trust, to the hazard of a loss on account of their dual character, so long as such property can be separated and distinguished, from the funds held by them under their trust as executors.

The transaction between the plaintiff and Mrs. Lambert was, so far as here appears, a beneficial one for both of the funds intrusted to her, and in receiving the plaintiff's money she was acting in the performance of her legitimate duty as an executrix. It was clearly the duty of Mrs. Lambert when she used the plaintiff's money in acquiring this mortgage, to have caused a recognition of the plaintiff's interest to appear in the instrument itself (*Price v. Blakemore, supra*), and it was evidently her intention to repair this omission before her

death, by making such a declaration of trust as would protect the interest of the plaintiff, and the question in this case is whether legal proof has been given from which a court of equity will find the existence of the trust.

Co-executors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently, the acts of any one of them, in respect to the administration of estates, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. (Williams on Executors, 810; *Wheeler v. Wheeler*, 9 Cow. 34.) Thus one of two executors may assign a note belonging to the estate of the testator (*Wheeler v. Wheeler, supra*), or make sales and transfers of any personal property of the estate. (*Bogert v. Hertell*, 4 Hill, 492.) He may release or pay a debt, assent to a legacy, surrender a term, or make an attornment, without the consent or sanction of the others. (Williams on Executors, 812; *Jackson v. Shaffer*, 11 Johns. 513; *Douglass v. Satterlee*, Id. 16; *Murray v. Blatchford*, 1 Wend. 583.) It was said in *Wheeler v. Wheeler (supra)*, "That if a man appoint several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the acts of all." It would seem to follow from this principle, that they have the power of joint and several agents of one principal, and that any act done or performed by one within the scope and authority of his agency, is a valid exercise of power, and binds his associates.

It is quite true, however, that neither executors nor administrators, whether acting separately or jointly, have authority to create an original liability on the part of the estate, or enter into an executory contract binding upon, or enforceable against it. (*McLaren v. McMartin*, 36 N. Y. 88; *Ferrin v. Myrick*, 41 Id. 315; *Austin v. Munro*, 47 Id. 356.)

It would seem to follow, as the result of the authorities, that the powers of executors, in the administration of estates confided to them, are commensurate with those expressly

granted or necessarily implied, from the nature of the duties imposed upon them, and their power to bind their associates by their acts, is limited only by the nature of the transactions they are called upon to perform. Thus, having no power to bind the estate by a new contract, or to revive a demand which has once expired, neither their contracts nor admissions can have the effect of creating one or reviving the other; but having the original power to transfer the property of the estate for the purposes of their trust, any act, whether performed by one or all, which has this effect, is within their authority and binds the estate. It must be assumed, however, that such a transfer is made for a lawful purpose, and in form sufficient to operate as a transfer of property between individuals.

We are, therefore, of the opinion that the acknowledgments of Mrs. Lambert constituted a good declaration of trust, and that the making thereof was an act done in the performance of her duty, as an executrix of the estate of Thomas Lambert, which operated upon and was enforceable against it. It would hardly be contended, under the circumstances of this case, that a declaration made by Mrs. Lambert at the time these moneys were received by her, as to the purpose for which they were received, would have been incompetent to prove her trust character, even as against her co-executor; and it is difficult to see why a similar declaration made by her at a subsequent time would not be equally competent. Such a declaration could in no just sense be said to create any liability against the estate represented by her, or subject it to any action on account of the statement made, for such an action could arise only by a wrongful refusal on the part of the executors to recognize the plaintiff's equitable rights of property. The arrangement shown by such a declaration, instead of creating a liability against the estate, would simply have the effect of protecting the party advancing the money from an unjust claim of ownership on the part of the executors, by reason of the form in which the securities for the loan were taken.

The establishment of this trust works no injury to the estate, for the evidence, aside from the declaration, shows quite

conclusively that the plaintiff's money, to the extent of the lien claimed, and to which the estate had no title, went to make up the value of the property now in the possession of the defendant.

Some objections were made by the appellant to remarks that fell from the plaintiff while giving her evidence, that tended to show personal communications and transactions between herself and Mrs. Lambert. The witness was admonished by the court not to relate such transactions, and no ruling was made by the court, or exception taken by the appellant, on the subject of such evidence on the trial. After the close of the trial the appellant asked to have these expressions struck out. This motion was denied by the court, and we think correctly disposed of.

The expressions referred to were inadvertently used by the witness, were ruled as incompetent by the court at the time they were made, and were not relied upon in deciding the case.

The conclusion arrived at on the main point of the case renders it unnecessary for us to consider the question as to the admissibility of the declarations of one executor against his associate when offered as evidence to prove the facts stated in such declarations.

The judgment should be affirmed.

All concur.

Judgment affirmed.

FARISH vs. COOK.

[78 Missouri, 212.]

CONSTRUCTION.—"ALL MY WORLDLY GOODS."—**REAL ESTATE NOT INCLUDED.**

A gift of "all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle, also whatever debts may be due me, likewise my house and lot," will not pass other real estate not specifically mentioned.

ACTION of ejectment.

Henry W. Williams and *E. T. Farish*, for plaintiff in error.

Krum & Krum and *Glover & Shepley*, for defendant in error.

MARTIN, C. This was an action of ejectment, commenced on the 26th day of February, 1875, in the Circuit Court of the city of St. Louis, to recover possession of a tract of land in the Grand Prairie Common Fields, two arpens in width by forty in depth. The defendant denied the plaintiff's right of possession, and pleaded the defense of the statute of limitations, relying upon an actual, uninterrupted, and exclusive adverse possession for more than forty years before commencement of the suit. The case was tried by the court, and a great deal of evidence peculiar to this class of cases was submitted on both sides. The merits of the case seem to have been disposed of in certain rulings on the evidence, as the case proceeded. At the conclusion of the evidence, the defendant asked, and the court gave the following instruction :

If the court finds from the evidence that the defendant took actual possession of the land in controversy in this suit as early as the year 1848, and that he has had actual, continuous and uninterrupted possession of the same ever since, and down to the commencement of this suit, under claim

and color of title adverse to the plaintiff, and those under whom he claims, then the plaintiff cannot recover in this action.

After this action of the court the issues were found for the defendant, and judgment rendered in his favor. The plaintiff appealed to the St. Louis Court of Appeals, and the judgment was affirmed. (6 Mo. App. 328.)

The evidence in the record tended very strongly to prove that the defendant, and those under whom he claimed title, had been in the uninterrupted and peaceful possession of the land under color of title from 1845, a period of thirty years. This ought to be a good defense against any title, unless some of those disabilities indicated in the statute, such as minority and coverture, have occurred to arrest the effect of its beneficent provisions. The plaintiff claims that the owners of the title asserted in this case, were under the disability of coverture a sufficient length of time to deprive defendant of his full bar of the statute which he otherwise would have. It becomes necessary to examine this important and decisive question, which seems to have disposed of the case in both of the lower courts. If the defendant is right in his defense, nothing can be gained by considering the difficult questions relating to the location of the Spanish grants given in evidence, which have been discussed with so much learning and ability by the counsel for both sides.

The plaintiff's chain of title commenced December 30, 1766, with a Spanish concession of that date, of two arpens front by forty in depth, in the Grand Prairie, to John Baptiste Hervieux. This original grantee died on the 6th day of November, 1775, and on the 7th day of January, 1776, at the judicial sale of Hervieux's estate, under an order of the lieutenant-governor of Illinois, Louis Honore became the purchaser of this concession. Louis Honore died on the 26th day of April, 1807, leaving as his sole heir Louis Tesson Honore, his son. On the 2d day of February, 1816, Recorder Bates, under the provisions of the Acts of Congress of June 13th, 1812, and March 3d, 1813, reported this concession to Congress for confirmation, and it was confirmed in pursuance of the Act of Congress of

April 29th, 1816, to John Bte. Hervieux's legal representatives. This confirmation enured to Louis Tesson Honore, owner of the title at that time. Louis Tesson Honore died on the 21st day of August, 1827, leaving a widow, by name Amaranthe, and a child named Maria, who was born August 14th, 1827, seven days before his death. He also left a will which he had made on the 7th day of August, 1827, two weeks before his death, which was admitted to probate on the 1st day of October, 1827, in which, it is claimed by plaintiff, he intended his widow should be his devisee as to this land. His widow married Louis Leduc on the 30th day of January, 1832, and died November 24th, 1864, under the coverture of this marriage. His daughter Maria married William Booth on the 26th day of April, 1848, and during the coverture of this marriage deeded the land to the plaintiff on the 3d day of August, 1874, in consideration of the sum of five dollars.

It is obvious from this statement relating to the title that it became an important matter to the plaintiff, in meeting the defense of the statute of limitations, as to which one of the two methods of devolution afforded him the best right of action in 1875, when he filed his petition. If he derived his title from Mrs. Booth, as the only child and heir of Louis Tesson Honore, then the title descended to her subject to her mother's dower at the date of her father's death, August 21st, 1827. Her minority would arrest the running of the statute of limitation until the 14th day of August, 1848, at which time she attained her majority. But her coverture, which commenced April 26th, 1848, a few months only before the expiration of her minority, and continued till she made her deed to plaintiff in 1874, could not be added to her disability of minority for the purpose of continuing her exemption from the bar of the statute; provided the adverse possession of the defendant commenced under her first disability of minority. Now, it is in evidence, as heretofore stated, that the adverse holding of defendant and his grantors did commence in 1845, which was about three years prior to her majority. The deduction of three years on account of her

minority would leave an adverse holding of twenty-seven years, upon which judgment would have to go for defendant.

If the plaintiff could successfully derive title from Mrs. Booth, as inheriting it from her mother as the devisee of the father, then the defense of the statute would be overcome, because she would not have inherited it till the death of her mother on the 24th day of November, 1864, and the coverture of her mother with Louis Leduc from January 31st, 1832, would arrest the operation of the statute as against the adverse possession of defendant commencing in 1845, and pass the title to Mrs. Booth on the 24th day of November, 1864, unimpaired by its effects. The coverture of Mrs. Booth existing at that date, and continuing till her conveyance to plaintiff in 1874, would arrest the operation of the statute till that date, and leave the defendant with an adverse possession within the statute of about one year instead of twenty-seven. The coverture of the mother and the succeeding coverture of the daughter would not constitute a cumulation of disabilities, because they appertain to different parties.

It is proper for me to remark here, that I am stating the position which the plaintiff takes in order to meet the defense of the statute of limitations, and that I have no occasion to consider whether the bar of twenty-four years, in the Act of 1847, is affected by coverture or minority. (*Valle v. Obenhouse*, 62 Mo. 81.)

The controversy is thus narrowed down to the single question as to whether Louis Tesson Honore devise this land to Amaranthe, his widow, or died as to it intestate, thus casting the descent at once upon his daughter, who afterward married William Booth and conveyed it to the plaintiff. The determination of this question depends upon the construction of the will of Honore. The only clause by which anything was devised in the will is as follows: "Secondly, I give and bequeath to my beloved wife, Amaranthe Honore, all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle; also whatever debts may be due me; likewise my house and lot I now occupy in the city of St.

Louis, to be by her enjoyed during her life, and at her death to belong to the child with which she is pregnant, if it should survive her, if not, then said house and lot to be vested absolutely in my said wife, to be by her disposed of as she may think proper." This is an authentic translation of the will, which was written in French. If this land was devised by the will, then it must have been included in the words "all my worldly goods."

While it is true that the intention of the testator must govern the construction of his will, it is equally true that this intention must be obtained from the words of the instrument, as applied to the subject-matter and the surrounding circumstances. The intention must come from what he says in his will. If this is apparent from the words as applied to the subject-matter, it should be accepted and followed by the courts, unless it contravenes the law or leads to absurd conclusions. When such results are threatened, the action of the court is governed by rules which need not be considered in this case. Did the testator, by using the term "all my worldly goods," intend to devise this land to his wife?

One of the rules of construction adopted by Jarman, and accepted in England and America, is, "that words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained, and they are in all cases to receive a construction which will give to every word some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy." (2 Jarman on Wills, 762.) The wisdom of this rule is more strongly recognized the more it is applied. In the case of *Gray v. Pearson* (6 H. L. C. 61), Lord Wensleydale remarks: "I have been long and deeply impressed with the wisdom of the rule now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest

of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further." In *Young v. Robertson* (4 Macq. H. L. C. 314; 2 Scotch App. Paterson, 1108) the court says: "The primary duty of a court of construction in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary, and a technical meaning." Judge Strong, in *Christie v. Phylfe* (19 N. Y. 344), decided in 1859, says: "The language used shall receive its ordinary interpretation, except where some other is necessary or clearly indicated." In determining what is the natural and ordinary sense of the words used in a will, adjudicated cases can render no valuable assistance. They are too apt to mislead or bias the mind.

According to its natural grammatical and ordinary meaning, the word "goods" does not include lands. It includes only personal property. General usage has given it this meaning. This is its primary signification. If it possesses any other meaning in this will it must appear from the context. Of course, if the testator had declared in his will that, by the use of the term "goods," he intended to include real estate, that intent, so declared in the will, would control the ordinary meaning of the word. So if, in the absence of any express declaration, it appears from the context of the will that he intended to use the word in a different and more comprehensive meaning, so as to embrace real estate, the courts would give effect to that intent. But I am unable to discover anything in the context of this will to indicate that the word was used with such a meaning. In prefixing it with the words "all my worldly" he makes use of a phrase which, if used alone with the word "goods," might be reasonably supposed to embrace his lands; and this meaning of the phrase has in some instances been sustained. But the subsequent language indicates, by its enumeration, that he did not intend it should include real estate, for he continued, "consisting

of household furniture, clothing, beds and bedding, money and cattle." He wills her his worldly goods, and tells what they are, thus restricting the meaning to personal property. He next wills the debts due him, which as rights of action do not ordinarily fall under the designation of "goods." He next proceeds to dispose of his real estate, making special mention of it, which naturally excludes that kind of property from the operation of the language, which he had restricted to certain personal property. If he had other real estate in his mind at the time, he would naturally have mentioned it when making specific devises of such property.

If the term "all my worldly goods" in the first part of the will is to be construed as including real estate unmentioned, then the clause relating to the real estate mentioned will have to be construed as an exception to the devising intent of that clause, because it gives only a life-estate to the devisee in respect to the house and lot so mentioned. This construction cannot be accepted for the reason that the language relating to the house and lot has neither the force nor the purport of an exception.

This theory of interpretation is not urged by the plaintiff. But in maintaining that the term "worldly goods" includes the real estate in suit, he admits and contends that only a life-estate was given to the widow in the goods, chattels, money and rights of action, as well as the real estate mentioned; and following out this interpretation to its proper conclusion, he insists that the will should be construed as if it read as follows: "I give and bequeath to my beloved wife, Amaranthe Honore, all my worldly goods, to be by her enjoyed during her life, and at her death to belong to the child with which she is now pregnant, if it should survive her. My worldly goods consist of household furniture, clothing, beds and bedding, money and cattle, also debts due to me, likewise a house and lot, which I now occupy, in the city of St. Louis. If the unborn child does not survive its mother, then the said house and lot is to be vested absolutely in my wife, to be disposed of as she may think proper." But the language of the instrument will not admit of this transposition, for the simple

reason that the life-estate, by the express language used, is confined to the house and lot. The house and lot were "to be by her enjoyed during her life," and in the event of her surviving the child, then the "house and lot" were to be hers absolutely. To extend this limitation to the personal property mentioned, and the real estate unmentioned, would be equivalent to making a will for the testator instead of accepting the one he left.

It is urged by plaintiff that another interpretation would be in violation of the rule that a testator, in making a will, is presumed to intend the disposition of his whole estate, and not to die intestate as to any part of it. This is a natural presumption which ought to have weight in construing doubtful phrases. (*Ibbetson v. Beckwith*, Talbot's Cases, 161; *Winchester v. Foster*, 3 Cush. 366.) But no implication of this kind can supply the actual intent of the testator to be derived from the clauses of the will. The rule has generally been applied in the construction of the subsequent clauses of a will, when the first or prefatory clause disclosed the actual intent to devise everything. (*Gaines v. Fender*, 57 Mo. 342.) In *Leake v. Robinson* (2 Mer. 385), Sir William Grant, Master of the Rolls, remarks: "There is certainly a strong disposition in the courts to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property." But when the clause to be construed cannot be connected with some other part of the will disclosing that intent, there seems to be no good authority for application of the rule. (*Denn v. Gaskin*, Cowp. 657; *Right v. Sidebotham*, 2 Doug. 759; *Smith v. Hutchinson*, 61 Mo. 83; *Bowlin v. Furman*, 34 Mo. 39.) And even when the actual purpose to devise everything is indicated, it cannot prevail in the absence of language sufficient to carry everything.

It is possible that the testator thought that he had devised everything he possessed. His language does not include the outlying claim in the Grand Prairie, and there is no evidence from the will or otherwise, that he had it in mind at the time of making his will. It had cost his father only thirty-three livres, payable in doeskins, which would be about \$6 60,

and the value of it was probably not sufficient to make it such an important matter if he should die intestate with respect to it.

Upon the whole, it seems to me that the testator did not intend to devise his lands under the term "goods;" that a plain and natural meaning is given to every other part of the will without including the recognition of such an intent, and that, too, without leading to anything like total intestacy; and that such an intent cannot be evoked from the context of the will without ignoring its obvious import and meaning. I concur entirely with the Court of Appeals in its interpretation of this will, and think its judgment should be affirmed.

Accordingly it is so ordered.

PHILIPS, C., concurs; WINSLOW, C., absent.

See *Clark v. Atkins*, *ante*, page 97, and references in note, page 101.

COIT vs. COMSTOCK.

[51 Connecticut, 352.]

**CHARITABLE USE.—CORPORATION TO BE ORGANIZED.—DEVISE TO
KEEP BURIAL LOT IN REPAIR.**

A bequest to executors to be held until a corporation can be formed to take the fund, the object of the gift being stated to be "the founding of a home for aged, respectable, indigent women who have been residents of the city of New London," is valid.

A bequest to keep certain burial lots in good order and apply the residue of the income to the maintenance of religious services, is invalid. The last object is legal, but the first is not.

ACTION to construe the will of Seth Smith.

Testator gave the following directions as to the distribution

of the residue of his estate after certain gifts to his wife, and upon them the main questions arise :

"I give and bequeath, out of said residue, five thousand dollars to the ecclesiastical society in New London, known as The Second Congregational Society, to be invested by said society in some safe securities and held as a perpetual fund, the annual income of which shall be expended as follows, viz. :

"So much thereof as shall be necessary in putting and keeping in good order my burial lot in Cedar Grove Cemetery, and in the proper care and preservation of the graves and monuments in said lot ; and the remainder of said annual income shall be expended in the maintenance and support of the religious services in connection with said society. In case said society shall at any time fail to comply with the provisions hereinbefore named, as to said burial lot, graves and monuments, then the bequest to said society shall become void, and the said sum of five thousand dollars shall fall into, and I do give and bequeath the same to be added to the fund hereinafter bequeathed to found the Smith Memorial Home, as hereinafter provided."

A similar bequest was made to a Congregational Society at East Lynne, and then came the following clause :

"I give, devise and bequeath all the rest and residue of my estate, real and personal, to my executors, or, in case my said wife survives me, to whomsoever upon her decease shall be legally entrusted with completing the settlement of my estate, upon trust, to hold, take care of and manage, and receive the same, and the rents, profits and income thereof, until an act of incorporation can be obtained from the General Assembly of the State of Connecticut, by the name of the Smith Memorial Home ; and with such powers as may be necessary and proper to carry into full effect the purposes and objects of this bequest ; and to convey, transfer, assign and deliver the said trust fund, with its accumulations, to the corporation created by such act, as soon as such corporation shall be duly organized. The purpose and object of this bequest is the founding of a home for aged, respectable, indigent women, who have been residents of the city of New London, under such regulations as may be

prescribed or provided by such act of incorporation. I direct that the building and real estate necessary for such home shall not cost, out of the fund hereby provided by me, more than twenty thousand dollars. I desire that my executors, or whoever shall be legally my representatives for the execution of this will, when said corporation is formed, to be corporators therein ; and also then, and ever after, the persons who shall be pastors, for the time being, of the First and Second Congregational churches in said town of New London ; and also, in the first place, such other persons as my said legal representatives, executors or otherwise, and the said pastors for the time being, shall associate with them ; and that when once such corporation has been duly organized, any vacancy in their number, other than of the pastors of said churches, who are *ex officio* members, be filled by the corporation itself as such vacancy occurs. I suggest that the plan of the Eliza Huntington Memorial Home, of Norwich, be adopted in the management of the home hereby provided for, so far as the same shall be applicable."

J. Halsey and A. Brandegee, for legatees.

H. C. Robinson, D. Chadwick and A. C. Lippitt, for heirs.

PARK, C. J. The principal question in this case grows out of a devise and bequest in the will of the late Seth Smith, of New London, which is as follows : [Given in full in the statement of the case, on preceding page.]

Two questions are presented for the consideration and determination of this court regarding this bequest.

1st. Are the beneficiaries described sufficiently to enable a court of chancery to carry it into effect ?

2d. Is it obnoxious to our statute against perpetuities ?

The books are full of cases regarding the first question, wherein charitable uses have been discussed for centuries, by all grades of courts, from the lowest to those of last resort in England and in this country, and it would be unprofitable and useless to consider more than a few of them, for conflicting opinions abound, so much so that we must come at last to our

own adjudications upon the subject, and perhaps to some of those of our sister States, for aid in arriving at a decision of the question.

The intent of the testator to create a public charity for the benefit of the aged, respectable and indigent women of the city of New London, is fully and clearly expressed. There is no mistaking his object and purpose; and his right to dispose of his property in the manner indicated cannot be questioned. Indeed it is said that gifts to public charity are highly favored by the law, and courts of chancery will uphold them if it can possibly be done. "This is a charity which a court of equity is bound to uphold if practicable," said Judge Foster, in *White v. Howard* (38 Conn. 366). "Charities are highly favored in law, and they have always received a more liberal construction than the law allows to gifts to individuals." (1 Story's Eq. Jur. § 1165.) "Courts look with favor upon charitable gifts, and take especial care to enforce them, and guard them from assault, and protect them from abuse." (Perry on Trusts, 630.) "Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish the intent of the donor; and trusts which cannot be supported in ordinary cases, will be established and carried into effect where it is to support a charitable use." (*Sanderson v. White*, 18 Pick. 333.) "If it is once determined that the donor intends to create a public charity, very different rules from those which are applied in establishing private trusts will be applied, in order to effect the intent of the testator and establish the charity." (Perry on Trusts, 629.)

The beneficiaries in public charities must necessarily be described in general terms. They are persons in most cases yet unborn, and particularization is out of question. Classes may be described, running down through all time, but individuals can only be designated as belonging to such classes. Testators, therefore, in their description of parties to be benefited by their public charities, must necessarily be confined to such terms as "the aged," "the indigent," "the sick," "the lame," "the infirm," "the destitute," of a certain class or of a certain territory. These terms have a customary and popular meaning, and

the parties to whom they apply are reasonably unmistakable, although the terms are indefinite to a certain extent. Our statute of charitable uses could find no better terms to define its meaning than the general phrases, "ministry of the gospel, and relief of the poor." Judge Foster, in *White v. Howard (supra)*, says: "After all, there is no more uncertainty here than there is in the statute of 1702. If this devise is void for uncertainty then this provision in the statute must be void for the same reason. We should hesitate to pronounce a decision declaring one of the clauses of this ancient statute void for uncertainty." Perry (on Trusts, p. 651) says: "In order that there may be a good trust for a charitable use there must always be some public benefit open to an indefinite and vague number. That is, the persons to be benefited must be vague, uncertain and definite, until they are selected or appointed to be the particular beneficiaries for the time being." Judge Story in his work on Equity Jurisprudence, § 372, says: "Courts of equity now, in most of the States, take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if they are sufficiently certain to be intelligible." Indeed, the famous statute of 43 Elizabeth, in enumerating "the pious and godly uses" to which it applies, employs no more definite descriptions than the following—"relief of the aged," "the maintenance of sick and disabled soldiers and marines," "the education and preferment of orphans," "the marriage of poor maids," "the supportation of tradesmen and handicraftsmen," that of "persons decayed," "the redemption of prisoners and captives."

It would be strange indeed, if the law should require a testator to be more particular in the description of the objects of his bounty in charitable bequests for the relief of such unfortunates, than are the terms of the statute itself which authorizes such bequests to be made.

The uncertainty that must exist in such cases is reduced to certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the particular objects of the bounty. *Id certum est quod certum reddi potest*. Judge Storrs, in *Brewster v. McCall's Devises* (15 Conn. 292), says:

"A devise is never to be construed as absolutely void but from necessity; if it be possible to reduce it to a certainty the devise is to be sustained." Judge Daggett said in *Bull v. Bull* (8 Conn. 50): "If a rule is given by which the persons can be described, if not with entire certainty yet sufficiently so to uphold the devise, and if it can by possibility be upheld, it can never be pronounced void." The court in *Holmes v. Mead* (52 N. Y. 322) said: "It is not material that the legatees should be definitely ascertained and known at the date of the will, or even at the death of the testator. It is sufficient if they are so described that they can be ascertained and known when the right to receive the legacy accrues."

In the case at bar the beneficiaries of the testator's bounty are described as definitely as could be expected in a bequest which was intended to be perpetual. Provision was made for the selection of the parties to be benefited from the class designated, by a corporation with sufficient by-laws and regulations for the purpose. This is equivalent to the appointment of trustees in perpetual succession to make the selection. Such being the case, we think that the best considered cases in this State and elsewhere sustain us in holding that this gift to public charity is valid, so far as the question we are now considering is concerned.

We will briefly consider a few of our own decisions on the subject. In the case of *Bull v. Bull* (*supra*) a remainder was bequeathed to executors, in trust for the most needy of the testator's brothers and sisters, with express authority and power to the executors to make distribution to the most needy. The court say: "Here it can be ascertained who are *the most needy* of the brothers and sisters and their children. A rule is given by which the persons can be designated, if not with entire certainty yet sufficiently so to uphold the devise." This was a private charity, where, it seems, the rule of certainty in the description of beneficiaries is more stringent than is required in public charities; still the description would seem to be as indefinite as in the case at bar. The case was saved by the power given to the executors to make a selection, which the law alone

could never have done. It required judgment and discretion to ascertain the "most needy."

In the case of *Treat's Appeal from Probate* (30 Conn. 113), a devise was made to trustees for the promotion of education and science among the Indian and African youth of the United States and elsewhere, with full power in the trustees to make selections of beneficiaries from the class designated. The court say: "As to the objects of the charity, what can be more unambiguous and certain? The class is certain, and the individuals to be selected from the class may be made certain by the selection of the trustees." Here again the devise was saved by the power given to the trustees to make selections from the class designated. It might have been asked as cogently in that case as similar questions are asked in this, what age is comprehended by the word "youth?" what number of years and days does it include, so that if any addition be made, the party will pass beyond youth, and be of an age beyond the limits of the devise? So, again, up to what mixture of Indian or African blood with the blood of other races of men, will a person still retain the Indian or African character or cease to belong to those races? There would seem to be as much uncertainty here as in the words "aged," "indigent," "respectable." Youth—aged! The one is in the early part of life, the other in the latter; where one ceases, or the other begins, is, manifestly, equally indefinite. In the case of *White v. Fisk* (22 Conn. 31), a bequest was made to trustees for the support of indigent pious young men preparing for the ministry in New Haven. The court held the bequest void on the ground that no power was conferred upon the trustees to make selections from the class described, and that the description of the beneficiaries was too indefinite without such power. The court say: "The difficulty of carrying this provision into effect is as great as if no trustee had been appointed; for no rule of determination, selection or appointment is furnished by the will, and no positive or discretionary power of determination bestowed. It has been suggested that the power of selecting the beneficiaries under this be-

quest, and of apportioning the sums of money annually to be disbursed among them, is in the trustees. We do not so understand it. Their only power is to expend the money—to pay it out to the persons entitled under the will to receive it. * * * There is a class of cases, the authority of which we recognize, where the individual beneficiaries under a will, but included in a definite class, are left uncertain, and yet the bequest for their benefit has been sustained. But these are cases where the gift has been to some corporate or voluntary association, whose business and duty it becomes to dispense the charity; or where power is very certainly conferred by the will upon the executor or trustee, to discriminate and select, or to apportion the application of the funds.” Judge Ellsworth, in *Treat's Appeal from Probate* (*supra*), in commenting upon this case, says: “The testator had provided in his will no way of selecting the beneficiaries from a class, and the court held that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees, the clause in the will would have been sustained, and Judge Hitchcock would not have been disappointed in his benevolent purpose.” The case of *White v. Fisk* has been strenuously urged to show the bequest in question void, but instead of showing this, the case sustains the legality of the bequest. The uncertain words in that case were, “indigent,” “pious,” “young.” In the case at bar, “indigent,” “aged,” “respectable.” The word “indigent” appears in both cases. Can any one say that the words, “aged,” “respectable,” are more uncertain than the words, “pious,” “young?” Still it appears by *Treat's Appeal from Probate* that *White v. Fisk* would have been sustained if power of selection had been given to the trustees.

There are many cases elsewhere which maintain the same doctrine. (*Washburn v. Sewall*, 9 Met. 280; *Odell v. Odell*, 10 Allen, 1; *Saltonstall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 465; *Fellows v. Miner*, 119 Mass. 541.)

Cases might be cited from other States to the same effect, but we think it unnecessary. We think the bequest is valid so far as this question is concerned.

Some question has been made with regard to the meaning of the phrase "have been residents of the city of New London." It is said that a will speaks from the death of the testator, and that the meaning of the phrase therefore is, have at that time been residents, &c. It is true that wills generally speak from the death of the testator, but there are many exceptions to the rule. The language of a will is to be construed according to the manifest intent of the testator as shown by the will. This bequest was intended to be perpetual. The corporation to hold the property during all coming time is burdened with the duty of making selections of beneficiaries from time to time, perpetually, and when selections shall be made, the parties selected shall *then* "have been residents of the city of New London." This is the obvious meaning of the phrase.

Some question has also been made in respect to the meaning of the word "home," as used in the will. But we think it is equally clear what was the precise meaning the testator attached to the word. He was describing a house for the permanent residence of the aged, indigent, respectable women of the city of New London. Webster defines "home" to be "a dwelling house; the house where one resides; residence." Surely, there is no uncertainty in the will regarding the meaning of the word.

Is the bequest void by our statute against perpetuities?

The property is bequeathed to the executors of the will in trust for the public charity therein created, "until an act of incorporation can be obtained from the General Assembly of the State of Connecticut."

It is said that, should an act of incorporation never be obtained, the property would remain in the hands of the executors perpetually, and that consequently the bequest is obnoxious to the statute.

It is manifest from the will that the testator intended that the property should remain in the hands of his executors but a short period of time. The language of the will is, "until an act of incorporation can be obtained." Clearly this act was to be procured as soon as it could be done. It is clear, therefore, that a reasonable time only for the act to be obtained was con-

templated by the testator. But it is said that the State might refuse to grant the act. It is true that it may be within the limits of possibility that the sovereign power might refuse. And so might the donee of a gift refuse to receive a benefaction tendered. The State was to a great extent to be benefited by this public charity, for many of its citizens, who in part make up the body politic, were to be benefited through all coming time. It was scarcely possible, therefore, that the State would refuse such a benefaction tendered to its citizens, tendered in part to itself.

It is further said, that no one is charged with the duty of bringing the matter to the attention of the Legislature and procuring the act of incorporation. We do not so understand the will. The executors were burdened with this duty. They were appointed to execute the will, and they accepted the trust. A part of its execution was to carry into effect this bequest, and they would have been recreant to their duty had they neglected or refused to execute this important part of their trust. Executors must pay legacies, and this was in the nature of a legacy to the "aged, indigent, respectable women of New London." Their duty could not have been fulfilled until they had procured an act of incorporation, and transferred the property to the corporation when organized. Hence, the gift of the property to the executors was for them merely to hold for such a reasonable time as might be sufficient for them to procure an act of incorporation from the Legislature, and then transfer the property to the corporation as soon as it should become organized. Surely the will itself was not obnoxious to the statute. What would have become of the property if an act of incorporation had not been procured within such reasonable time, it is not necessary to consider.

There is another view of this question. The testator in this bequest declares his object and purpose to be the founding of a home for the aged, &c., which should endure forever. He realized that men must die, but corporations never die. He desired, therefore, to have the charity under the management and administration of a corporation that should endure as long as the home should exist. To carry out this object he gives the

property to his executors, to be transferred to the corporation as soon as it should be chartered and organized. The instrumentality of the executors was employed merely to pass the title to the corporation. Nothing is said in the will as to the beneficial interest in the property becoming vested in the beneficiaries when the property should be conveyed to the corporation. It became vested in them on the death of the testator, liable to be divested if a corporation should not be organized within a reasonable time under all the circumstances. There is no room for claiming that the property did not vest till the conveyance should be made to the corporation. The charity could not be administered till then, but its administration had nothing to do with the vesting of the property, any more than the possession of property by a devisee has to do with the vesting of the same in him. Reversionary interests vest in a party when the possession of the property is in another. So here, the property became vested on the death of the testator, but the time when the beneficiaries should enjoy the charity was deferred till the corporation should become organized and the property conveyed.

There is nothing in either of these views of the question which conflicts with the case of *Jocelyn v. Nott* (44 Conn. 55), which has been so strenuously claimed. In that case real estate was devised to trustees till some Congregational church, orthodox according to the faith, order and discipline of the Congregational churches of Connecticut, and connected with the General Association of the State, should become organized and should build a church edifice upon the land, for the worship of God according to the usages of such church, and till the trustees should become satisfied that the cost of the building had been paid, and the church and society were free from debt, and permanently established on the land; then the trustees were required to convey the property to the society. The court held the devise void by the statute against perpetuities.

It will be observed that there was no connection whatever between the trustees and any one of the Congregational churches of the State of the order described. They were to

hold the property till some one of such churches should comply with the numerous conditions, which the court well said might never occur. The devise was a mere offer of the land, and the trustees were to wait and see whether any one of the churches described would accept the proposition. Clearly, that case is not analogous to the one at bar.

The case of *Ould v. Washington Hospital for Foundlings* (95 U. S. Reps. 303) is strikingly like the one under consideration. The devise was there made to trustees to hold the property till an act of incorporation should be passed by Congress, establishing a hospital for foundlings, and then convey the property to the corporation. Justice Swayne, in giving the opinion of the court, says: "The testator chose to reach the end in view by the intervention of trustees, and instructing them to convey at the proper time. This provision in the will was, therefore, a conditioned limitation of the estate vested in the trustees, and nothing more. Their conveyance was made necessary to pass the title. The duty with which they were charged was an executory trust. * * * When such uses are consummated, and no longer *in fieri*, the law of perpetuity has no application." (See, also, *Inglis v. Sailors' Snug Harbor*, 3 Pet. 310.)

We think the bequest is not obnoxious to the statute against perpetuities.

We think the bequests to the ecclesiastical societies are void by the statute, on the ground that they create perpetuities. A sum of money was bequeathed to each of the societies described, to be invested as a perpetual fund; and the annual income thereof, or so much as should be necessary, applied in keeping in good order certain burial lots, and the remainder of the income, if any, applied to the maintenance of the religious services of the societies. The will then goes on to say that in case the societies should at any time fail to comply with these conditions, in keeping in good order the burial lots, the bequests should become void.

It has been held in numerous decisions, that bequests for the purpose of keeping burial lots or cemeteries in good order

or repair, are not given in charity, and, therefore, are not protected by the statute of charitable uses.

If the sums of money had been bequeathed to the societies without condition, and the income thereof applied to the maintenance of the religious services of the societies generally, and one of their duties had been the keeping in good order burial lots or cemeteries, then the bequest would have been given to a charity, and would have been protected by the statute of charitable uses.

But the bequests as they are, although some portion of the income is to be devoted to a charitable purpose, cannot be supported. If it were otherwise it would be in the power of an individual to make a perpetuity of property to any extent, by devoting some small portion of the undivided income thereof to some charitable purpose. A little charity, in such a case, cannot preserve the entire bequest.

Neither can the forfeiture clause protect the bequests. There might not be a forfeiture within a thousand years, and during all that time the property, devoted to keeping in order the burial lots, would be a perpetuity contrary to the statute.

We think the bequest to the Smith Memorial Home is valid; but that the bequests to the ecclesiastical societies are invalid; and so we advise the Superior Court.

In this opinion Pardee and Loomis, JJ., concurred.

IVINS' APPEAL.

[106 Pennsylvania, 176.]

HUSBAND NOT HEIR OR NEXT OF KIN TO WIFE.

A husband cannot take under a devise to the "heirs and next of kin" of his wife.

PROCEEDINGS to distribute an estate.

William G. Foulke and *Crawford & Dallas*, for appellant.

George Junkin, for appellees.

GREEN, J. We are of opinion that the learned court below has pronounced the true construction of the testator's will, in the final decree. The subject of the testamentary provision was an aggregate of personal and real estate. The objects of the testator's bounty were his *heirs* and *next of kin*. By the will he had given all the residue of his estate to his three daughters absolutely and in fee simple. By the codicil he made a radical change, and gave the residue to a trustee, in trust to keep the real estate in repair and rented, and the personal estate securely invested, and to pay the net income of the whole to the daughters, and to hold the principal in one-third parts in trust for the uses and purposes declared by the last wills of his daughters respectively, and in default of wills, for the use of child or children of the daughters; "in default of such will, and child and children or issue of such, then the principal to go to the heirs and next of kin of the daughters so dying, as provided by the intestate law of Pennsylvania." In this provision there are apt words which define with technical precision each of two classes of beneficiaries, to wit, *heirs* and *next of kin*. It has been so often held that when technical words are used in a will or other instrument they must have their technical meaning, unless a contrary intent appear, that it would be a mere affectation of learning to cite the authorities. On the question of intent, in this case, the will and codicil abound with evidence that the intention of the testator corresponded precisely with the strict legal meaning of the words used. The distinction between real and personal estate is constantly preserved, both in the words which refer to them descriptively, and in those which relate to their disposition. Thus, the residue being composed of personalty and realty, he *gives* and *devises* it, *absolutely* and *in fee simple*. He gives the personalty absolutely, and he devises the realty in fee simple. This is the fifth clause of the will, and by the same species of concentrated and elliptical expression, he directs in the third clause of the codicil the same residue, *given* and *devised* to his daughters, to be "*given to*, and be *vested in*," the trustee *absolutely* and *in fee simple*, in trust to repair and rent the *real estate* and securely invest the *personal estate* for the use of his

daughters. Then when he provides for the contingency which has happened, to wit, the death of a daughter without a will, children or issue, he directs that the principal shall go to the *heirs* and *next of kin* of the daughter so dying. It is impossible to doubt, from this language, that the distinction between real and personal estate was constantly in the mind of the testator, and that he intended that the part of the principal which consisted of realty should go to the heirs, and the part which consisted of personalty should go to the next of kin. We think we would be doing violence to the manifest intention of the testator if we held to any other construction. There is no occasion here to give an untechnical meaning to technical words, as was done in the cases referred to in the appellant's argument, in which the word *heirs* was held to have the same meaning as next of kin, or distributees, or persons entitled under the intestate law. Such a course is sometimes necessary to effectuate a testamentary result, to prevent a will from becoming practically inoperative. Thus, if a testator gives personalty to a class of persons whom he names as *heirs*, the law, in aid of his intent, will consider the word as descriptive of the persons who would take as the representatives by law of the deceased person. This doctrine is illustrated in various forms and circumstances in *Patterson v. Hawthorn* (12 S. & R. 112), *Buckley v. Reed* (3 Harris, 83), *Gibbons v. Fairlamb* (2 Casey, 217), *Eby's Appeal* (3 Norris, 241), and other cases. These cases, however, do not at all conflict with those of the other cases which hold that where technical words are used, and there is a subject to which they may apply, the technical meaning must prevail. Thus, in *Clark v. Scott* (17 P. F. S. 446), where a testamentary disposition was made quite similar to the one we are considering, this rule was strictly applied. On p. 451 Sharswood, J., said: "The testator, Thomas P. Ash, after devising his residuary estate, real and personal, to several persons, declared that in case of the death of either of them before him, the devise or bequest should not lapse, 'but shall go to, and be taken by the heirs, executors or administrators of said legatees or devisees so dying, in the same manner as if the same had been specifically devised.'

He was evidently aware of the distinction between real and personal estate. He has used throughout his will the words legally appropriate to each. All his legacies of mere personality are by the words 'give and bequeath,' but when he comes to the residuary clause in which he blends both his real and personal estate, he is careful to use the words 'give, devise, and bequeath,' and adds a limitation to 'heirs, executors, administrators and assigns.' We may infer, then, that in the substituted gift for the lapsed devise the word 'heirs' was used in none other than its legal technical meaning. Apart, however, from this very important assistance at arriving at the true intention of the author of the disposition, it is a canon of construction settled in many cases, that the word 'heirs' shall receive its appropriate technical sense, unless there is some language or expression which shows that it was used in the broader and more popular sense." Other illustrations of this ruling are found in *Ralston v. Waln* (S Wr. 279), *Porter's Appeal* (9 Wr. 201) and *Eby's Appeal in Wisler's Estate* (14 Wr. 311). It does not seem necessary to pursue the subject further. Whether we consider the strict meaning of technical words employed, or the clear intent of the testator, as the guide in the construction of this testament, the result is the same. The husband is neither the heir nor the next of kin of his wife in the technical sense of those words, and there being other persons in being who do fill that description we must hold that they, and not he, are the true beneficiaries under this codicil.

Decree affirmed at the cost of the appellant.

The husband is not the "heir or next of kin" of the wife.—In *Wilkins v. Ordway*, 59 N. H. 378, Clark, J., says: "If husband and wife were of kin or heirs of each other, the relationship would extend to the children of either by a former marriage, and a decree of divorce would dissolve it. The common law doctrine of dower and curtesy originated in the fact that husband and wife are not heirs of each other. Ordinarily, technical terms are to be understood according to their legal signification, unless some evidence appears of an intention to use them in a different

sense. The phrase 'next of kin,' as applied to relatives by blood, having a technical legal signification, under the statute of distributions, when used without qualification is held to mean next of kin according to the statute. But husband and wife are nowhere included with 'heirs' or 'next of kin' in the statutes. These terms in their proper and legal signification and acceptance have reference to relationship by blood. * * * But as the interpretation of a will is the ascertainment of the testator's intention, very little competent evidence may be sufficient to show that the testator used the word heirs in a broader sense than its legal meaning, intending to include the husband of a deceased wife, or the widow of a deceased husband, and when such intention is shown by competent evidence, it is his will, however inartificially expressed; but ordinarily, in the absence of evidence showing a different intention, the word 'heirs' will be understood as used in its legal sense."

It is a very well settled rule that a wife is not the heir of her husband. The distinction between widow and heir or next of kin was recognized in the statute 21 Henry VIII, ch. 5, which provided that administration should be granted to the widow or next of kin, or both. Under that statute the husband, it should seem, is not the heir of the wife, nor she of him, and it is plainly declared that she is to take administration not as next of kin, but as widow. *Holt v. Watt*, 3 Ves. 247.

That a widow is not the heir of her deceased husband is declared in *Lord v. Bourne*, 63 Me. 368; *Tillman v. Davis*, 95 N. Y. 17; *Dodge's Appeal*, 106 Penn. St. 216.

Neither is the wife a relation of her husband. *Esty v. Clark*, 101 Mass. 86; *Cleaver v. Cleaver*, 39 Wis. 96; 2 *Williams on Executors*, 1104; 2 *Jarman on Wills*, 49.

Nor will the phrase "next of kin" include the widow in the absence of evidence *aliunde* as to the intent. *Keteltas v. Keteltas*, 72 N. Y. 312; *Murdock v. Ward*, 67 Id. 387; *Luce v. Dunham*, 69 Id. 86.

In England it seems that this phrase sometimes will include a widow on somewhat general principles, and that upon this precise point the law there is in confusion. Speaking to that point, Vice-Chancellor Bacon said, in the case of *Steven's Trusts* (L. R. 15 Eq. Cas. 110): "This is one of those cases which certainly calls for the enactment of a Code, or of some rule for the interpretation of expressions to be found in wills. In the midst of the 'confusion worse confounded' which exists among the authorities on this subject, I must endeavor to put such a construction upon the language of this will as the general sense of the instrument requires." The conclusion reached was that in this case "heirs" meant next of kin, and that the widow should be included. In *Withy v. Mangles*, 10 Clark & Fin. 215, Lord Campbell, referring to the words "next of kin" in a deed of settlement, said: "It is impossible to deny that the law has by some bad luck got into a strange state, and that now, unless

great caution is observed in framing deeds, many calamitous consequences will take place."

It does not appear that in this country there is such incertitude upon this point. But, on the contrary, the law appears to be reasonably well settled as set out (*supra*).

In *Storer v. Wheatley's Executors*, 1 Penn. St. 506, Chief Justice Gibson said: "A wife is not related to her husband in any respect. Of his connection with her family she is the link, or *commune vinculum*, but so far is she from being connected with him as a relation that her civil existence is melted into his, and they together form one person. A wife, therefore, is no more a relation or connection of her husband than the husband is a relation or connection of himself." This must be understood to mean not that there is no relation of a wife to her husband, or of a husband to his wife, but that such a relationship as is implied usually in the use of the term "relation" is not to be understood between them. *Davies v. Baily*, 1 Vesey, Sr. 84; *Worsely v. Johnson*, 8 Atk. 758 (by Lord Hardwicke); *Cleaver v. Cleaver*, 39 Wis. 96, a full and learned opinion to this point by Chief Justice Ryan.

GRAHAM vs. GRAHAM.

[23 West Virginia, 36.]

SUPPLYING WORDS.—PARTIAL INTESTACY.

Testator gave one-third of his personal property to his wife, devised a specified one hundred acres of land to a daughter, adding, "and the rest of my estate personal to be divided among my four sons," held, the court could not supply the words "real and" before "personal," and testator was intestate as to real estate except the one hundred acres devised.

ACTION for partition and construction of will.

A. C. Houston, for appellants.

JOHNSON, President. Joseph Graham by his will made the following bequests:

"In the first place I give to my beloved wife Rebecca one-

third of all my personal property, and also any use she may have need of any part of my land, that may be in possession of her children during her life, in proportion to what they possess.

"And in the second place, I give my daughter, Betsey Ballenger, one hundred acres of land where she now lives, to be laid off according to a writing in her favor, and not to be of the two hundred and eight-six acre survey which is given by her grandfather's will to her mother.

"I also give to my daughter Florence Nowlan ten dollars worth of my property.

"I also give to my daughter Jane and her daughter Martha each, one dollar a piece, and the rest of my estate personal, to be divided equally among my four sons, and the children of my daughter, Rebecca Ballenger, and if they should all die without issue their part of my estate is to be divided among my sons and their heirs as the case may be.

"Given under my hand and seal this 26th day of September, 1854.

"JOSEPH GRAHAM. [SEAL.]

"CODICIL.

"Having made my last will and testament of my estate, real and personal, on the 26th day of September, 1854, and in the said will I have bequeathed two-thirds of said estate to my four sons and the three children of my daughter, Rebecca Ballenger, and I hereby revoke that share of said estate which is left to my son, Lanty Graham, and after all my just debts are paid, the balance to be divided among three sons and Rebecca's children, as witness my hand and seal this 18th day of October, 1854.

"JOHN GRAHAM. [SEAL.]"

The will and codicil were admitted to probate in May, 1858.

In a suit in the Circuit Court of Monroe county, to have the will construed and partition made of the real estate, of which the said Joseph Graham died seized, it appeared that the legal title to about eighteen hundred and twenty-one acres of

land was in said Graham; and it appeared, that he had advanced to some of his children lands, and given them title bonds therefor: to his daughter, Elizabeth, one hundred acres valued at three hundred dollars; to John Graham, seventy-five acres valued at two hundred and sixty-two dollars and fifty-cents; to David Graham, one hundred and thirty-five acres valued at four hundred and five dollars; to the plaintiff, James Graham, one hundred and thirty-nine acres valued at four hundred and seventeen dollars.

By a decree rendered in the cause on the 21st day of October, 1879, the court construed said will and held, "that the real estate of Joseph Graham, deceased, passed under the said will to David Graham, John Graham, James Graham and the children of Rebecca Ballenger, and that Florence Nowlan took nothing under said will except the specific bequest of ten dollars." The decree proceeds to appoint three commissioners to lay off said land into four equal parts and to assign the same, one to David Graham, one to John Graham, one to James Graham, and the other to the children of Rebecca Ballenger, and report to the court, so that a final decree could be made.

From this decree Lanty Graham and the heirs of Florence Nowlan appealed, and assign as error, that the court held that Joseph Graham by his will disposed of all his real estate.

It is evident from the decree of the Circuit Court, that words were supplied in order to make effectual the supposed intent of the testator. It was held by this court, in *Houser v. Ruffner* (18 W. Va. 244), that, in construing wills, words and expressions of doubtful meaning will not be construed, if it can be avoided, so as to create an intestacy. The testator, having made his will, will be presumed to have intended to dispose of his whole estate, unless the contrary plainly appear. While this is true, there is another rule quite as binding on the court in the construction of a will, viz., that the heir must not be disinherited, unless it is done by the express terms of the will, or by necessary implication. (*Irwin v. Zane*, 15 W. Va. 646.) The heir at law never takes by the act or intention

of the testator. His right is paramount to and independent of the will, and no intention of the testator is necessary to its enjoyment. On the contrary, such right can only be displaced or precluded by direct words or plain intention, evincing a desire upon the part of the testator, that he shall not take, &c. He needs no argument or construction showing intention in his favor to support his claim. They belong to the party claiming under the will and in opposition to him. (*Augustus v. Seabolt*, 3 Metc. [Ky.] 155.) In *Creswell v. Lanson* (7 Gill. & Johns. 227) it was held, that the heir being favored in law, there should be no strained construction to work a disinheritance, where the words are ambiguous.

In the will before us, in order to make effectual the supposed intent of the testator to disinherit several of his heirs, the clause in the will which provides, "and the rest of my estate personal to be divided equally among my four sons and the children of my daughter, Rebecca Ballenger," was changed by the interpolation of the words "real and," so as to read, "and the rest of my estate *real and* personal, to be equally divided," &c. Was the interpolation of those words justifiable; and did the intention of the testator, as gathered from the whole will, require that they should be interpolated? The intention of the testator must be gathered from the will itself, whenever it is possible to do so. Every word is to have its effect, provided an effect can be given to it not inconsistent with the general intent of the whole will when taken together; and no word is to be rejected, unless there cannot be a rational construction of the will with the word as it is found. Nor is it necessary to take all the words in the order in which they are placed, as the court may, by transposition, so arrange them as to comply with the intention of the testator. But in no case where the words are plain and unequivocal, is a transposition to be made, in order to create a different meaning and construction from that which they naturally had as written, much less to let in different devisees and legatees, or exclude those already provided for. Where a former clause is express and particular, no subsequent clause shall be permitted to enlarge it, if the two clauses can stand together. When a testator, in

the disposal of his property, overlooks a particular event or matter which, had it occurred to him, he would probably have guarded against, the court will not employ or insert the necessary clause for the purpose of supplying the omission. And, though the inference of intention be more or less strong, yet, if not necessary or indubitable, the court will not aid the supposed intention by adding or supplying words. (*Augustus v. Seabolt*, 3 Metc. [Ky.] 155.) All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole.

The inconvenience or absurdity of a devise is no ground for varying the construction, where the terms are unambiguous. But when the intention is obscured by conflicting expressions, it is to be sought in a rational and consistent rather than in an irrational and inconsistent purpose.

Words and limitations may be transposed, supplied or rejected, when the immediate context or the general scheme of the will warrants it, but not merely on a conjecture or hypothesis of the testator's intention. (*Jackson v. Hoover*, 26 Ind. 511.)

In the construction of wills, the rule that the general intent to dispose of the whole property should prevail in preference to any particular intent, applies to cases where there is an intention exhibited to make a certain disposition of the property, and the mode of executing that intention is erroneously, defectively, or illegally prescribed in the will, and not to cases where there is a clear intention to effect another purpose, distinct and differing from the general object. If the testator uses language which can be construed so as to carry the general intent and purpose into effect, it is the duty of the court to so construe the language as to accomplish that object; but the court is not authorized to supply omissions by adding words, even for such a purpose. The testator must express his intention or use such language as will enable the court to ascertain what his intention is in order to make it effectual. (*Pickering v. Langdon*, 22 Me. 413.) When implications are allowed they must be such as are necessary, or at least highly probable, and not merely possible. In construing a will conjecture must not be taken for implica-

tion. Necessary implication means, so strong a probability of intention that any intention contrary to that imputed to the testator cannot be supposed.

The whole will taken together must produce the conviction that the testator's intention was to create the estate raised by implication. (*McCoury v. Leek*, 14 N. J. Eq. 70.)

I will give from a number of the adjudicated cases some instances of the supplying of words. In *Lynch v. Hill* (6 Munf. 114) it was held, that in supplying words in a will it is the most correct course to supply such only as it is *evident* the testator *intended* to use, and not such also as would be necessary to *effectuate* the supposed intention of the testator. In that case the words of a contingent limitation being, "*in case S. N. C. without issue of body lawfully begotten, then,*" &c., the words "die" and "her" may be supplied as evidently intended by the testator, but not the word "leaving," which he might not have known to be necessary in law to give the limitation effect, and, therefore, might not have intended to use.

In *Dew v. Barnes* (1 Jones' Eq. 149), the provision of the will was, "if either of my should die without a lawful heir, the longest lived heirs the whole of both estates." Battle, J., said: "The word '*either,*' taken by itself, signifies one or another of any number, but it is here confined to two by force of the word '*both*' which signifies '*two*' considered as distinct from others or by themselves. The omitted word or words then is, or are, '*sons*' or '*two sons*;' and it is so plain that such and no other was the testator's meaning, that no argument can make it plainer."

In *Sessoms v. Sessoms* (2 Dev. & B. 453), the word "dollars" was supplied after the words "five hundred" it being clear from the will that that was the intention.

In *Geiger v. Brinnon* (4 McCord, 418), in a bequest to a wife the testator said: "All my household furniture and the increase of the said negroes during her natural." The word "life" was supplied.

In *Reid v. Hancock* (10 Humph. 368) the bequest was: "I give to my wife all my property during her widowhood, until

my children become of lawful age. After that event I wish it equally divided among them." It was held that the manifest intent of the testator to give all his property to his wife during her widowhood *or* until his children should become of lawful age, and on the happening of *either* of these events to divide it equally between the wife and children ; and to carry out manifest intention, the court will supply words and disregard strict grammatical construction.

In *Kellogg v. Mix* (37 Conn. 243) the language of the will was: "After paying my debts I give to my beloved wife C., in trust for the maintenance of herself during her life and of my daughter E. so long as she remains single ; and to my son G. four hundred dollars a year to be paid to him by my trustees." A previous clause had given the entire estate to trustees for the purposes to be stated in the will. No other disposition of the income, which was over four thousand dollars a year, was made during the life of the widow ; but the income was given to the children after her death, and any appropriation of any part of the principal of the estate before her death was forbidden, unless with her consent ; and there was a provision, that she should have the entire use of her portion of the estate until her death. Held, that it was clear that the testator intended to give his widow *the net income of the estate* during her life, except the four hundred dollars given to his son, and that these words should be supplied in construing the legacy to her.

In *McKeehan v. Wilson* (53 Pa. St. 74) it was held that when the omission or insertion of words has left unexpressed or wrongly expressed what, from the whole tenor of the will, was the intention of the testator, the court will permit the will to be read as if the words had been inserted or omitted. But this is to be done only when such intention is clear beyond a reasonable doubt by the will itself, except in some cases of latent ambiguity. The rule applies to a *defectively expressed* intent. If from the will the intent cannot be gathered, words cannot be supplied to disclose an intent. In that case, it was held, that the word "children" may include "grandchildren," where succession is evidently intended.

In *Zerbe v. Zerbe* (84 Pa. St. 147) the testator's will contained this clause: "First I give and bequeath unto my son Edward and Peter and my daughter Catharine and Mary my daughter's children Daniel, John, Elizabeth and Emma Mull they shall stand in equal shares, that is to say Mary's children shall have the share of their mother. Item, my son Daniel and Jarrett and my daughter Sarah and Louisa's child Edward Hummel they shall have nothing of my estate, they have more now than their shares would come to. Last and also I appoint my son Edward and John Zimmermann farmer as my executors of this my last will and testament and they shall have a right to sell the property and make it into money, when they think fit to do so, or when it will bring the most money." Held, that this will carried all the real and personal estate of the testator to those mentioned in the first clause, and that the word "estate" belonged to the first clause of the will as well as the second, and that the word "shares" in the first clause, corresponds to the same word in the last clause, and both refer to the same estate.

In *Varner's Appeal* (87 Pa. St. 422) the testator devised all of his estate to trustees, to pay over the income of one-half thereof to his granddaughter until she attained the age of twenty-five years and then to convey to her in fee the one-half of his estate, "subject to the payment of its *pro rata* share of the annuities hereinafter charged on my said estate." In another clause of his will he directed the income of the other half to be paid to his two nephews and a niece in equal shares, and when the youngest of them attained the age of twenty-one years, their shares should be conveyed to them in fee, "subject to the payment of the *pro rata* share of the annuities hereinafter charged upon my said estate." In two separate clauses he created annuities and made them an express charge upon the shares of the nephews and the niece, but made no mention of the granddaughter in either of these clauses. Commissioners were appointed to make partition of the estate, who divided the same into two parts and charged each with the payment of one-half of the annuities, which charge the court sustained, on the ground that it was

the manifest intent of the testator to charge both parts of his estate, and that it was evident that the name of the granddaughter had been omitted by mistake in the clause giving the annuities. Held, reversing the court below, that the name of the granddaughter could not thus be supplied, and that her share was not subject to the burden of the annuities; that words can only be supplied in a will, where they are necessary to give effect to the unquestionable purpose of a testator, but, where they will not advance this intent, no such change can be made.

In *Cleland v. Waters* (16 Ga. 496) a testator, after naming sundry slaves, male and female, adds: "On account of the faithful services of my body-servant, William (the husband of Peggy), I will and do devise his emancipation or freedom with the future issue and increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c., of the authorities of the State of Georgia, I direct my qualified executor to send the *said slaves* out of the State of Georgia to such place as they may select; and that their expenses to such place be paid by my executor out of my estate, and the whole proceedings be conducted according to the laws and decisions of the State of Georgia, I having no desire or intention to violate the spirit or intention or policy of such State. * * * I desire that the said slaves, if compelled, may select their residence out of the State of Georgia and in any part of the world." The will directed the forfeiture of the interest of any legatee who might resist said item. Held, that the intention of the testator was to manumit *all* the slaves mentioned in that item of the will; that where a will is absurd or ambiguous, as it stands, the court may supply words to carry into effect the intention of the testator, when that intention is clearly manifested.

What effect have prior or subsequent words upon the operative part of the will? It might be insisted that the language used in the codicil shows what the testator meant by the words used in the operative part of the will. In *Burton v. White* (1 Exch. 525) the testator used this language: "I give and bequeath to my son George the lease of the farm I rented of

Lord L. for his own use and benefit, and also half an acre of freehold land adjoining that one acre of copyhold land." The will contained other devises, and at the end was this passage : "And I give and bequeath and order the rents or interests, that is behind, due and unpaid, shall go and be paid to that person I have left *the estates and properties* respectively to. As to all the rest, residue and remainder of my property whatsoever, and of what nature or kind soever, I give, devise and bequeath the same to be equally divided between and amongst my said wife, Nancy, and her children who have issues, share and share alike." Held, that a fee in the lands devised did not pass to George, for, though the word "estate" in the operative part of a will passes not only the *corpus* of the property, but all the interest of the testator in it, unless controlled by the context, yet where that word is not used in the operative clause of the devise itself, but is introduced into another part of the will, referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.

Pollock, C. B., said, after quoting the clause : "It is contended that this clause is explanatory of the testator's meaning and shows that he intended all his interest in the devised land to pass. It is established by a long course of decisions, that the word 'estate' or 'estates' used in the operative part of a will passes not only the *corpus* of the property but all the interest of the testator in it, unless controlled by the context ; and that superadded words of local description more applicable to the *corpus* of the property, indicating its situation, or the nature of its occupation, do not prevent it from passing the whole interest. * * * But where the word 'estates' is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, we find no decision or *dictum* authorizing us to construe it as having the effect of extending the meaning of the operative clause, whether prior or subsequent, and to read the will as if the testator had said 'by the devise of lands in another clause, I mean to give all my estate in these lands.'" (See, also, *Varner's Appeal*, 87 Pa. St. 422.)

In *Doe v. Allen* (8 T. R. 497) a testator, in the introductory clause of his will, used the following language: "As to what real and personal estate it has pleased God to bless me with (all my debts, &c., being first paid out of my personal, and if that is not sufficient, out of my real estate), I give and dispose of the same as follows:" Then follows the operative clause: "I devise all my messuages, lands, tenements and hereditaments in S. & C. to A." Held, that A. took only a life-estate. If the same language had been used in the operative clause as was in the introductory clause of the will, A. would have taken the fee. Lord Kenyon, C. J., said: "The plaintiff's counsel, in arguing the case, anticipated the three grounds on which it might be contended on the part of the defendant that a fee passed by this will. The first is the introductory clause, in which the case of *Ibbetson v. Beckwith* is decisive. That case was decided by a great lawyer, Lord Talbot, who thought that such a clause, accompanied by other words, in a will would pass a fee, but that that alone was not sufficient for the purpose; and this case has been followed by a variety of others to the same effect." To the same effect is *Beall v. Holmes*, 6 Har. & J. 205.

In *Mellish v. Mellish* (4 Ves. 47) the Master of the Rolls said: "When this cause came on to be heard, it seemed to be the opinion of the plaintiffs, who filed their bill to compel the defendant Ann Ross to relinquish any interest she might have in the residue of the personal estate of her natural father, that it was a very plain relief against her. The only question arose upon a doubt, whether the name of 'Ann' in the clause of survivorship was interposed by mere mistake. When first it was opened, I was very much inclined to think, the mistake was so apparent, that the court would have excluded her; but upon very mature consideration of this will I think I should do too much violence to the words, if I were to indulge in speculations whether the word 'Ann' did or did not creep into the will by mere mistake. He begins by giving Ann Ross three thousand pounds sterling, payable at the age of twenty-one or marriage; and in the case of her death before that time he directs that legacy to be considered as part of the residue of his

estate; so that it is taking that sum out of the residue to fall into it again in that event. Then subject to some legacies and annuities he gives the residue among his other children; and then comes the clause of survivorship; upon which it is contended that the words, 'put share or shares,' are so confined to the residue, that it is impossible that the legacy of Ann Ross can be included. The question is: Can I see sufficient to enable me to declare, that demonstrably and incontrovertibly the name of 'Ann' crept in by mere mistake? I really believe it was so; but I dare not, as a judge, take upon myself to say this word cannot be reconciled with the rest of the will; and I always understood, that where there is a mistake or an omission, all the court has to do is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission."

In *Howland v. Union Theological Seminary* (1 Seld. 193) it was held, that introductory words in a will, declaring the general intent of the testator, can never alter the sense of a positive devise, so as to give a meaning to its terms, corresponding with the intent so declared, but differing from that which those terms plainly express. Where the words of a devise are obscure or ambiguous, the introductory clause may be justly invoked to aid, perhaps control, their interpretation, but when they are so clear and explicit as to admit but one interpretation, that must be followed, and the declaration of an opposite or different intent be wholly disregarded. The material subject of a devise, when clearly defined, can no more be changed than the interest in that subject which the devise purports to convey. And if a specific devise cannot be thus enlarged, a revocation just as definite and specific, upon which the devise is founded, is equally exempt from alteration. Duer, J., delivered in this case an able and very elaborate opinion, in which many authorities are cited which fully sustain the decision of the court.

In the will which we are considering, in the first clause the testator gave his wife one-third of all his *personal* property.

In the second clause he gave his daughter, Betsey Ballenger, one hundred acres of land on which he resided. He then gave to his daughter, Florence Nowlan, ten dollars ; to his daughter, Jane, and her daughter, Martha, one dollar each ; "and the rest of my estate personal, to be divided equally among my four sons and the *the* children of my daughter, Rebecca Ballenger, and if they should all die without issue their part of my estate is to be divided among my sons and their heirs as the case may be." In the codicil, which is of course a part of the will and in its construction to be read with it, he says : " Having made my last will and testament of my estate real and personal, on the 26th day of September, 1854, and in the said will I have bequeathed two-thirds of said estate to my four sons and the three children of my daughter, Rebecca Ballenger ; and I hereby revoke that share of my said estate which is left to my son, Lanty Graham, and after all my just debts are paid the balance to be divided among three sons and Rebecca's children."

To give this will the construction given by the Circuit Court, it seems to us, will violate every principle laid down in the cases which we have cited. There is no necessity to supply a single word. The words used in their natural ordinary signification only make the will to operate on the testator's *personal* property, except the devise of a hundred acres of land to the testator's daughter, Betsey Ballenger. But, it is said, in the codicil he recognizes the fact that he had disposed of *all* his real and personal property by his will. If this be true, as we have seen, it could not override the plain import of the words used in the operative clause of the will. But effect can be given to the expression "estate real and personal" used by way of recital in the codicil, as part of his real estate was, in fact, disposed of by the will, and he might have referred to that devise of the one hundred acres to his daughter by the expression ; and we presume he did.

There is another recital in the codicil, which shows that he did not consider that he had disposed of all his real and personal property. If so, then there was one-third of the real estate as to which he died intestate. In said will, he

says he bequeathed two-thirds of said estate to his four sons, &c., to whom did he give the other third of *said* estate? It is answered, to his wife. But the first clause of the will limits her, in the most unmistakable language, to one-third "*of all of my personal property*," and the use of what land she needs that may be in the possession of her children during her life. Then it is clear, that the testator himself, in the codicil, referred to the two-thirds of the estate, the other third of which he had given to his wife, which was the *personal* estate.

It is clear to my mind, that according to the well settled rules of construction, we are entirely unauthorized to supply in this will the words "real and" so as to make it apply to all the rest of his estate, both real and personal. The testator died intestate as to all his real estate except the one hundred acres which he devised to his daughter, Betsey Ballenger. The revocation in the codicil operated to exclude Lanty Graham from any interest in the personal property, but did not and could not affect his interest in the real estate, as to which his father died intestate.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

LOCKMAN vs. REILLY.

[95 New York, 64.]

EXECUTORS PURCHASING ON FORECLOSURE SALE.

Executors may bid in land sold under a mortgage held by them. The title is vested in them, and distributees or beneficiaries have no estate therein, and they can sell without any express authority in the will. The property should be treated and accounted for as personalty.

ACTION to compel specific performance of a contract.

Charles Jones, for appellant.

Edmund Coffin, Jr., for respondent.

RAPALLO, J. We are of opinion that the objection taken by the defendant to the title of the plaintiff to the real estate agreed to be conveyed, is not well founded. The property was purchased by the plaintiff at a judicial sale under a judgment for the foreclosure of a mortgage held by him. The fee of the mortgaged premises was at the time of that foreclosure vested in Mrs. Sarah P. Raynor, executrix of William H. Raynor, deceased, subject to the mortgage held by the plaintiff. In foreclosing his mortgage, the plaintiff made Mrs. Raynor a party defendant individually and as executrix, but did not make parties all the beneficiaries under the will of Raynor, and the omission to make some of these beneficiaries parties is now alleged as a defect in the plaintiff's foreclosure.

The executrix, Mrs. Raynor, obtained title to the premises by purchasing them at a sale under the foreclosure of a second mortgage on the same premises, which was held by Raynor at the time of his death. Raynor then had no title to the property, and, consequently, no title thereto was derived by his executrix under his will, and the beneficiaries thereunder took no interest in the property at the time of the testator's death. The only claim Raynor had was his mortgage, which passed as personal property to his executrix.

If the plaintiff had commenced the foreclosure of his prior mortgage while the executrix of Raynor still held this second mortgage, she certainly would have been the only party necessary to be made a defendant for the purpose of representing the interest of Raynor's estate in the mortgaged premises, and the beneficiaries under the will of Raynor would not have been necessary or proper parties to such foreclosure.

But before the plaintiff commenced his foreclosure the executrix of Raynor foreclosed her second mortgage, and for

the protection of her lien, bid in the property at the sale for a sum less than sufficient to pay the amount due on the mortgage and took a deed from the referee to herself, subject to the plaintiff's mortgage, in which deed she was described as executrix of and trustee under the will of William H. Raynor, deceased. The title, thus acquired, she held at the time of the foreclosure by the plaintiff of his mortgage.

By the will of William H. Raynor he devised his residuary estate, real and personal, to his executrix and executors in trust, to convert the same into money and invest the proceeds and apply the income thereof to the use of his widow and children during their respective lives, in certain proportions specified in the will, with remainders over to their issue in the principal. The widow alone qualified as executrix. As such executrix and individually she was made a party defendant in the plaintiff's foreclosure, and the executors named in the will were also made parties, as well as the *cestuis que trustent*, the children of the testator, who were entitled to the income of the trust estate during their lives, but certain grandchildren of Raynor, then living, who had vested remainders limited upon the interests of their parents, were not made parties, and their omission is the defect alleged by the defendant.

The court at Special Term decided that the objection made by the defendant to the plaintiff's title was not tenable, and rendered judgment in favor of the plaintiff. This judgment was reversed at General Term, the court holding that all the parties interested in the estate of William H. Raynor, deceased, under the trusts created by his will and the remainders limited therein, were necessary parties to the foreclosure.

This decision is placed upon two grounds: First, it is said that the mortgage held by the testator Raynor was a portion of his estate, and included in the directions contained in his will, and that the grandchildren were interested in it in remainder, the same as they were in other portions of the testator's estate, and consequently necessary parties to the foreclosure of the prior mortgage. This position would lead to the conclusion that if the mortgage held by Raynor's executrix had not been foreclosed, but had remained in her hands as part of the

testator's personal estate at the time of the foreclosure of plaintiff's prior mortgage, all persons ultimately interested in the estate of Raynor were necessary parties to the foreclosure. This we cannot sustain. The legal title to all the personal estate of a testator vests by law in his executors, who represent the interests of all parties concerned, and have full power of disposition over it, and under the modern law in respect to mortgages, according to which the mortgagee takes no estate in the land mortgaged, the lien of a mortgage held by executors is effectually barred by the foreclosure of a prior mortgage in an action in equity to which the executors of the second mortgagee are parties. (Calvert on Parties, 19, 20.) The legatees, creditors or other persons interested in the estate of the deceased, are no more necessary parties to such an action than they would be to an action brought by the executors of the deceased party to foreclose the mortgage held by them, and it cannot matter what dispositions are made by the will, of the personal or real estate, provided the particular mortgage has not been specifically bequeathed and delivered over to the legatee.

But it is said, in the second place, that by the sale of the land to the executrix under the foreclosure of the second mortgage, and the conveyance to her as executrix and trustee under the will of the testator, the land became subject to all the provisions of the will, and under those provisions estates became vested directly in the testator's grandchildren, an estate in remainder being limited to them upon the death of their parents.

We cannot concur in this view. There is no question about the general rule that where the equity of redemption has been sold or devised, and become divided into particular estates and remainders, the owners of these estates should be parties to an action to foreclose the mortgage, and that when the equity of redemption has been vested in trustees for the benefit of others, the *cestuis que trustent*, as well as the trustees, should be parties. (Story's Eq. Plead. § 193.) But the trusts here referred to are express trusts under which the *cestuis que trustent* acquire equitable estates or interests directly in the land, as land,

and not trusts implied by law, where the whole legal title is in one person, subject only to a liability to account to others for the value of the property.

It may happen that an executor or administrator, without authority, invests the funds of the decedent's estate in land ; or he may take land in payment of a debt due to the estate which he represents, or may purchase it for the protection of the estate at an execution sale under a judgment belonging to the estate. Under such circumstances the executor or administrator in one sense holds the land in trust for the persons beneficially interested in the estate, and can be compelled to account for it. But if the land is subject in his hands to a prior mortgage, the mortgagee in foreclosing it is not bound to make the devisees or legatees in the case of an executor, or the next of kin in case of an administrator, or the creditors of the deceased in either case, parties to the foreclosure. The legal title to the land is in the executor or administrator, but as between him and the legatees, next of kin and creditors of the deceased party it is personal estate, and he holds it as the legal representative of the deceased.

In all the cases which have been referred to on the part of the respondent those who have been held to be necessary parties have been entitled to some direct estate or interest, legal or equitable, in the land as land. In *Nodine v. Greenfield* (7 Paige, 544) the party omitted had a vested estate in remainder in the land. In *Williamson v. Field* (2 Sandf. Ch. 563) the land had been devised by the testator in trust for his children and they had direct equitable estates in the land under an express trust. All the other authorities cited apply to cases of that description, and there is none which touches a case like the present. Here the land was bid in and purchased by the executrix simply for the purpose of protecting the estate from loss of the mortgage debt or some part thereof. It was not made as a purchase of land in trust for the children or grandchildren under a power contained in the will, for there was no power in the will to invest in land. The land acquired by the executrix did not come under the same rules as if it had been the property of the testator at the time of his death. In

that case the executrix would have had no title except such as she acquired under the will as trustee, and those entitled in remainder after the execution of the trusts created by the will, would have had vested legal estates in remainder in the land, subject to be defeated only by the execution of the power of sale contained in the will. In the present case the effect of the conveyance to the executrix was to make the land in her hands take the place of the mortgage, as personal estate; and she was liable to account for it as such. The conveyance had the same effect as if it had been made to her in her individual name. She had full power of disposition of the property, and although she was liable to account for its proceeds to those interested in the estate, and in that sense she held it as trustee, the trust under which she held it was one created by law, and not by the will of the testator. That will never operated directly upon it. It did not belong to the testator when the will took effect, and the beneficiaries under the will never acquired any direct estate or interest whatever, legal or equitable, in the property as land. They only had the right to require the executors to account for it as for any other item of personal estate in her hands as executrix. The entire legal title was vested in her and she represented the equitable interests of those who were thus entitled to call her to account.

That land bought in by executors on a foreclosure of a mortgage belonging to the estate is to be treated as personal property, which the executors may sell, and for which they are accountable as such, has been frequently decided, and it is immaterial whether the deed is taken in the names of the executors as such or in their individual names. (*Clark v. Clark*, 8 Paige, 152; *Schoonmaker v. Van Wyck*, 31 Barb. 457; *Valentine v. Belden*, 20 Hun, 537; *Cook v. Ryan*, 29 Id. 249.) In all these cases land thus purchased by an executor or administrator is regarded as a substitute for the mortgage foreclosed, and takes its place for all purposes as between the executor or administrator and the parties interested in the estate. It is not treated as land belonging to the testator. His heirs or devisees take no direct interest in it and cannot dispute the title of a purchaser from the executor, though no power of

sale be contained in the will. The heirs of an intestate cannot question the title of a purchaser from his administrator who has purchased land under such circumstances. (*Long v. O'Fallon*, 19 How. [U. S.] 116; Williams on Executors, p. 650, note d.)

The fallacy of the argument on the part of the defendant consists in assuming that the property became subject to the trusts and estates created by the will. As to real estate of which the testator died seized, those trusts and limitations took effect directly, but as to the personal estate the case is different. The title to personalty vests in the executors, as such, by operation of law, and their title as executors is paramount to that as trustees. Trustees can take personalty only through the executors. Trustees, even when they are the same persons as the executors, take only as legatees. (*Newcomb v. Williams*, 9 Metc. 525.) The interests of the beneficiaries under the will of Raynor never attached directly to the property now in question. They never had any interest in it as land. It was personalty when the testator died, and so far as their rights are concerned it still remained personalty in the hands of the executrix, as executrix, when the plaintiff foreclosed his mortgage. If upon a sale under the plaintiff's mortgage there had been a surplus, the children or grandchildren of Raynor would have had no standing in court at any time, however remote, to claim any part of such surplus. The executors or administrators of Mr. Raynor were the only parties who could intervene for that purpose, and the plaintiff's foreclosure, to which they were parties, by barring their rights clearly protected the purchaser, under that foreclosure, against the claims of all those to whom the executors of Raynor were equitably accountable and whose rights depended upon theirs.

The order of the General Term should be reversed, and the judgment rendered at Special Term should be affirmed, without costs to either party.

All concur.

Order reversed, and judgment affirmed.

MARSHALL vs. CARSON.

[38 New Jersey Equity, 250.]

EXECUTOR PURCHASING AT SALE OF TESTATOR'S PROPERTY.

Executors directed to sell lands to pay debts cannot become purchasers at sale of such lands under an execution against the testator.

ACTION to declare void a purchase of land by executors.

P. L. Voorhees and *S. H. Grey*, for appellants.

Bergen & Bergen, for respondents.

KNAPP, J. The appellants, the defendants below, were executors of the last will of David E. Marshall, deceased. The testator, at his death, left a large real estate, most, if not all, of which was to some extent incumbered by mortgage, and there were judgments recovered against him in his lifetime, to the amount of about \$14,000, upon which executions had issued and were in the hands of the sheriff at the time of his death.

By his will he empowered and directed his executors to make sale of so much and such parts of his lands as they should select for that purpose, as would be sufficient to pay his debts; and also devised to them five-twentyfourths of what should remain after paying such debts, and securing an annuity of \$400 to his wife for life, to be held by said executors in trust for his son, Charles E. Marshall, for his life. The executors failed to make sale of any lands for about seven months, or to pay or satisfy said executions, when a tract of land of about three hundred and eighty acres, consisting of several farms, was advertised and sold by the sheriff, at public sale, under the executions in his hands; and at such sale the appellants became purchasers for their own benefit. The complainants and respondents here were unpaid creditors of the estate, who had filed their claims under oath with the executors, and their claims were not disputed. Upon the advice of Vice-

Chancellor Bird, who heard the cause upon bill, answer, and proofs, the appellants were decreed to hold so much of the said lands purchased by them as remained unsold to *bona fide* purchasers, in trust for the creditors and beneficiaries of the estate, and they were required to account for the proceeds of such lands as they had sold to *bona fide* purchasers, together with the rents and profits of said lands; for expenditures made by them on account of said lands, credit was to be allowed. The decree thus made against them was put upon the ground that by the will which appointed them, as well as in virtue of their general duties as executors, they were charged with trusts in respect to said lands in favor of devisees and creditors with which their interests, as purchasers in their individual right, were so in conflict, that they were precluded from buying at the sale so made, and holding the purchase against such creditors and devisees. Other grounds for invalidating the sale were laid in the bill, upon which a large volume of testimony was taken, but the court below put its decision upon the ground stated; and the argument here has gone mainly on the correctness of the legal rule and the propriety of its application to this case. The appellants claim that, notwithstanding their position of executors under the will, their purchase of the testator's property in their own right at a sale under executions against him in his lifetime, or, indeed, at any time, was legal and proper; that, as executors, they were chargeable with no duty relative to the testator's lands when in legal custody, or in process of sale to satisfy judgment liens thereon, and might bid and buy such property as might any stranger, provided they neither procured, promoted, nor encouraged such sale to be made; in short, that in bidding successfully at the sale, their personal interests were not adverse to any duty or trust which they held toward the estate, but, on the contrary, advanced rather than opposed the interests of the estate and its creditors. The legal doctrine which the appellants assert, and must maintain in support of their present claim, if they hold trust relations to this property, is, that a trustee is incapacitated from purchasing trust property only when such trustee is directly or indirectly the vendor of such property, and that his

title acquired by purchase at the sale of such property by another cannot be called in question by his *cestui que trust* except for actual fraud.

The rule that one clothed in a fiduciary character cannot either directly or indirectly become a purchaser of the trust property at his own sale and hold such property against the dissent of the *cestui que trust*, is of such universal prevalence and so grounded in the demands of public policy, that no one ventures to question its existence, or seeks now to overthrow it. Is this case within the reason and force of this rule? In looking at the many cases involving consideration of this doctrine, a sale by or under the control of the trustee, is not always present as a feature in the litigations which in judicial judgment have called for the application of the salutary principle which the rule embodies. Its adoption is to prevent, as far as possible, fraud on the part of those having the control of trust property, and to protect, to the largest possible extent, the beneficiaries of such trusts, who, without this safeguard, are found by experience to be grievously exposed to the hazard of fraud and wrong-doing, such as courts find difficult, if not impossible, to redress. The necessity of placing guards around those whose interests are entrusted to the agency and control of others, springs out of the weakness and infirmity of human nature, which observation and experience show is not proof against the seductive and insidious influence of selfish interest, and ought not to be put to the temptation to acquire personal gain through failure in, or unfaithful performance of, fiduciary obligations. It recognizes the difficulty, if not impossibility, of tracing actual fraud in every case, and the frequent failure of justice and success of wrong that must be consequent thereon, and it attempts to apply a method that will remove all temptation from the mind of the trustee to profit by infidelity in the discharge of trust duties of every sort, and which will remove all inducements to act otherwise than faithfully toward the beneficiary, by utterly refusing to consider the question of good or bad faith, and holding the trustee who attempts to deal with the trust property as an individual, to all the chances of loss, and denying to him all

possible gain. This rule, although perhaps most frequently found applied in the decided cases where the existing fact is a sale by or under the direction of a trustee, is by no means limited to that circumstance, as reference to decided cases will show.

The principle stated by Chancellor Kent is expressed in the broad and comprehensive terms that a trustee cannot act for his own benefit on a subject connected with the trust, and he vindicates it by his usual strength of reasoning, fortified by a great array of cases of recognized authority (*Davoue v. Fanning*, 2 Johns. Ch. 252, and cases cited); and while in that case the purchase was indirectly by the trustees who sold, the ground upon which the trust was decreed as continuing, must, if maintained as a general principle, exclude the exception which the appellants here seek to engraft upon it, for, to admit it, is, I think, to strike down the principle itself.

Chancellor Walworth, in *Van Epps v. Van Epps* (9 Paige, 237), states the doctrine in this wise: "The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees or solicitors. But it is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

The principle was applied to a purchase at a master's sale on foreclosure by one who held a junior mortgage in trust for others, and because he was in duty bound to protect the interest of the *cestuis que trust*, which was to have the property bring the highest price, his interests as a purchaser on his own account were antagonistic to theirs.

In *Lytle v. Beveridge* (58 N. Y. 592) a devisee for life was

executor under the will of his father. There was a judgment outstanding upon which executions had issued in the lifetime of the testator. The executors, with personal estate in hand, failed to pay the execution claim, and the devised lands were sold by the sheriff and purchased by the executor, who was life-tenant. The devisees of the remainder in fee, on the death of the life-tenant, were held entitled to the lands against claimants by devise under the will of the executor so purchasing at sheriff's sale, that court holding it a breach of duty and violation of the fiduciary relations existing between the executor and the heirs and devisees of the testator to purchase the lands for himself, and that the title taken at sheriff's sale inured to the benefit of the devisees in remainder. The court there says, that a trustee or one charged with the duty of protecting and caring for property as executor, trustee, agent, or otherwise, cannot deal with it, or become the purchaser of it, for his own advantage and to the prejudice of *cestuis que trust*, heirs, devisees, or principals. The principle is universal and applies to all persons having a duty to perform in reference to a sale inconsistent with the character of purchaser.

The case of *Fulton v. Whitney* (66 N. Y. 548) presents another instance where the rule was applied to a trustee purchasing indirectly at a judicial sale. The same principle will be found applied in the following cases: *Case v. Carroll*, 35 N. Y. 385; *Tiffany v. Clark*, 58 N. Y. 632; *Bennett v. Austin*, 81 N. Y. 308; *Torrey v. Bank of Orleans*, 9 Paige, 649. In the well known case of *Staats v. Bergen* (2 C. E. Gr. 297), in this State, the point of decision was whether the rule was applicable to a purchase by a trustee at a judicial sale, and in the able opinion of Mr. James Wilson, who sat as master to advise with Chancellor Green, it was held that upon principle and authority it applied as well to such sales as to those made by the trustee himself. Many of the authorities are collected in that opinion. The decree in that case was, on appeal to this court, affirmed, the court finding no difficulty or impediment in the way of applying the principle to a purchase at an official sale.

Chief Justice Beasley, in delivering the opinion of this

court, uses this language: "The trustee is forbidden to purchase, because his interest as such purchaser is opposed to the interest of his *cestui que trust*, and he acts, therefore, under a bias in his own favor. Nor does this rule rest, to any considerable extent, in the fact that in a particular line of cases the trustee has peculiar opportunities for the practice of fraudulent acts with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts such opportunities may exist, and, consequently, the prohibition is universal, that he may not do anything which, while it is an advantage to himself, is, or may be, a loss to the trust estate. So jealous is the law upon this point that a trustee may not put himself in a position in which to be honest must be a strain upon him." He further adds: "I think, upon correct principle, a trustee, in no case, nor in any crisis, can become the purchaser of property when the fact of his making such purchase has a tendency to promote his own interest at the expense of his *cestui que trust*." What possible difference can it make, in reason and principle, in what manner or by whom the sale is made of that which the trustee holds, when his duty in his trust relations is to make the property bring the highest price, in the protection of the interests of the *cestui que trust*? His duty remains the same; he stands concerned, for the time being, as would be the owner of the property, in appreciating it. When he becomes the purchaser and exercises the conceded privilege of a purchaser to acquire at the lowest price, a direct conflict between fiduciary and personal interests arises. This, as I understand the rule, is the test of the validity of such a purchase, and not the indifferent circumstance that the sale is under the conduct of himself or another. To apply it in the former case and exclude it in the latter would be but a partial remedy for a far-reaching evil, and would narrow down a most salutary general principle within the narrow boundaries of a technical rule.

Neither the considerations of policy upon which the doctrine has its foundation, nor the well adjudged cases, permit such a limitation. The point is, the trustee shall not become

the *purchaser* of the trust property. Any exception engrafted upon the rule that a trustee cannot act for his own benefit on a subject connected with the trust, against the will or assent of the *cestui que trust*, will, in so far, be to abridge its usefulness and value.

This subject has been a fruitful source of controversy in the courts from quite early times, and, as might be expected, the cases are not at one on the question of the right of the trustee to purchase trust property when sold by another than himself. There are cases to be found apparently supporting the appellants' view, of which *Fisk v. Sarber* (6 Watts & S. 18) and *Prevost v. Gratz* (Pet. C. C. 364) are examples. In other cases are found *dicta* to the same effect. These cases the appellants' counsel has industriously collected, and I have endeavored to give them an attentive examination. I might, in respect to this case, quote the language of Mr. Justice Dixon, in *Stewart v. Lehigh Valley R. R. Co.* (9 Vr. 505, 523), where he says, speaking of this subject, that, "It has not always presented itself to the minds of judges in its full scope. At times they have been seduced into listening to suggestions that the circumstances of the special case showed the absence of fraud and overreaching. At other times they have intimated that the *cestui que trust* must seek his relief in equity." And he might have added that they were not always agreed as to what constitutes trust relations. And he adds: "But the strongest intellects have enunciated the rule with its utmost vigor and in its broadest extent."

But the cases referred to by counsel, both in this State and elsewhere, are not really at variance with the views expressed—indeed, they admit the rule, and all proceed upon the determination of the court that the purchaser whose title was sustained, was clothed with no fiduciary character in the questioned transaction. So concluding, the judgments following became inevitable. But I think it scarcely requires argument to show that the appellants in this case had a clear trust relation to this property. They voluntarily accepted the office of executors under a will which, in its first clause, empowered and directed them to sell as much of his real

estate as should pay all of the testator's debts, at such times and in such manner as they should judge for the best interests of the estate, and to make conveyances for the same. In the second clause, he directed an annuity to be paid to his wife for life, in lieu of dower in all his lands, and put upon his executors the duty of selecting upon which of them it should be secured. If it should be conceded—and I should be unwilling to make such concession—that, as executors, they, under the law empowering them to sell lands for the payment of debts when the personalty failed, were charged with no duty with respect to these lands, yet here, by the express terms of the will, such duty was imposed.

Again, in the fifth clause of the will, he devises to his executors five-twentyfourths of his lands remaining after paying his debts and securing the annuity to his wife, in trust for his son Charles, for his life. He further authorizes his executors, and instructs them, to rent any and all of his estate, and, with the moneys received therefrom, to pay the taxes, expenses and repairs. It thus appears, by the terms of this will, that these executors had the whole of this estate within their power of administration. It was their clear duty, in respect to creditors, to pay their debts, if there were found sufficient estate with which to pay. If the personalty failed, their duty was to sell lands until, with the proceeds, there was sufficient to pay. They were bound to use their best skill and judgment in the provident management of the property whose care, for the time, they had assumed; and in the interest of the creditors of the estate, as well as the beneficiaries under the will, they were called upon to be zealous in the effort to avoid a sacrifice of the property in any manner. If debts were pressing, and threatened slaughter of the estate by forced sale, their duty to exercise the power given by the will, to sell lands and satisfy debts, became more pressing. Every reasonable effort to avoid a sale by the sheriff was required of them, and if such sale became inevitable, while they were not bound to advance their own money for the estate, either in paying the debt directly or buying the property for the estate, yet, in reason, they were required to

see that the sale was fairly conducted according to law ; to use reasonable diligence to avoid fraudulent, unfair dealing in the sale ; to see that it was sold for the best price that could be obtained for it ; if unfairly sold, or at a great sacrifice, the fair discharge of their duty, in my judgment, required that they should take the proper steps to procure a re-sale. All these were required by the interests of the creditors and devisees under the will, and if those interests were to be protected at all, the executors were the persons peculiarly chargeable with that duty. If these correctly summarize the requirements of their office, then it is clearly manifest that their interests as purchasers of this property, on their own account, were directly opposed to every such requirement. If, because of judgments against the testator, they could, as they claim, fold their arms and withdraw themselves from the care of these lands, the estate would have been better off without such representatives ; interested parties could not be misled by relying upon them. Although they say they did make effort to stay the sale and accommodate with the pressing creditors, yet the sequel strongly presents the suspicion that, during the seven months of apparent inactivity, they were reposing upon the prospect of advantages such as they here claim as their right, for it is observable that, on the very day when they took their title from the sheriff, they were enabled to arrange with the largest judgment creditor by new mortgages, securing the same debt upon parts of the land conveyed, to set apart others to secure the annuity to the widow, and to sell for cash more than enough to pay the other judgment debts. Something of this diligence in effort expended in behalf of the estate would have obviated all necessity for the sale at which they became the purchasers, and secured the creditors at large. That results like those before us are liable or likely or possible to happen through secret design of trustees, in furtherance of private ends, is the strong ground upon which this protecting doctrine is rooted.

These executors were charged with obligations in respect to these lands with which their interests as purchasers on their own behalf were necessarily in collision. The creditors have a

right that their purchase shall be declared in the exercise of a continuing trust, their application therefor being within a reasonable time, and the decree, therefore, in the court below, should in all things be affirmed, with costs.

Decree unanimously affirmed.

'An executor may not become the purchaser of any portion of the assets.—It is a general rule, that an executor cannot be allowed, either immediately or by an agent or trustee, to be a purchaser from himself of any part of the assets, but shall be considered to the utmost, as a trustee for the persons interested in the estate, and shall account fully and exactly to such interested persons, for any advantage made by him personally out of such a purchase. There is no better settled rule of law than this, and none in support of which a greater array of authorities might be marshalled.

"One of the most firmly established rules," says Lord Eldon, "is, that persons dealing as trustees and executors, must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand." *Cook v. Collingbridge*, Jacob, 607.

In this case, a sale of a testator's share in a partnership, and the property belonging to it, made by the executors to the surviving partners, for the purpose of being resold to one of the executors, was set aside, and the estate held entitled to the testator's *aliquot* part of the subsequent profits as if the partnership had continued.

When an executor sells to himself, it is the better rule that such sales are void. *Dwight v. Blackmar*, 2 Mich. 330; *Chapman v. Comings*, 43 Vt. 16; *Hall's Appeal*, 40 Penn. St. 409; *Clark v. Blackington*, 110 Mass. 369; *Andrews v. Hobson*, 23 Ala. 219; *Scott v. Gorton*, 14 La. 115, and a multitude of cases collected in the notes to *Williams' on Executors*, 650, 988, 1842.

"It is contrary to every sound principle of equity," says Chancellor Manning, "to allow an agent who is authorized to sell property for the best price that can be obtained for it, to become the purchaser himself. It is immaterial whether the sale be public or private; whether the agent purchase in his own name or that of another,—the object is to secure fidelity on the part of the agent to his principal, and it is as applicable to public agents as others." *Ingerson v. Starkweather*, Walk. 846. Again, to the same point, in *Church v. Marine Insurance Company*, 1 Mason, 341. Mr. Justice Story said: "The law will not suffer any man to earn a profit,

or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at a public or private sale. The case then stands before the court as if there were no sale; the ownership has never been legally divested." This is the doctrine declared by Chancellor Kent, in *Davone v. Fanning*, 2 Johns. Ch. 268, conceded to be a leading authority; and again in *Torrey v. Bank of Orleans*, the same judge said: "It is a settled principle of equity, that no person placed in a situation of trust or confidence in reference to the subject of the sale, can be the purchaser of the property on his own account." 9 Paige, 649.

That these sales found no favor in the English Chancery may be seen in the reply of Lord Eldon, in *Ex parte Bennett*, 10 Ves. 384, to a remark by Lord Rosslyn, "that to effect the sale the trustee must make an advantage," which was "the principle is deeper, viz.: that if the trustee can buy in an honest case, he may, in a case having that appearance, but which from the infirmity of human testimony may be grossly otherwise."

Finally the matter is well illuminated by Strawbridge, J., in his opinion in the case of *Scott v. Gorton*, 14 La. 115, viz.: "The argument that he (the executor) became purchaser by bidding higher than any other, and thus did him (the heir) a benefit is unsound. 'When to prevent fraud, or from any other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with, on the ground that the particular act in question has not been proved fraudulent,' etc. The provision in question is not only for the protection of individual interest, but to maintain public order and morality. 'Lead us not into temptation' is its basis. It boots not that the tutor of a minor, or the administrator of a succession is the highest bidder, for, to be a purchaser, he must always be this. It would avail nothing, though he paid double the acknowledged value. His purchase is against public order; it is prohibited; it is pronounced a nullity, and all persons interested may oppose it."

A line of cases may, however, be found in which sales of this nature are held to be merely voidable, and not void absolutely. *Van Dyke v. Johns*, 1 Del. Chan. 93; *Worthy v. Johnson*, 8 Ga. 456; *Ives v. Ashley*, 97 Mass. 198; *Musselman v. Ashleman*, 10 Penn. St. 394; *Flanders v. Flanders*, 23 Ga. 249; *Munn v. Burges*, 70 Ill. 604; *Boyd v. Blankman*, 29 Cal. 19; *Riddle v. Roll*, 20 Ohio St. 572; *Smith v. Drake*, 23 N. J. Eq. 302; *Guerro v. Ballerino*, 48 Cal. 118; *Murphy v. Teter*, 56 Ind. 545; *Froneberger v. Lewis*, 70 N. C. 456.

In *Van Dyke v. Johns* (*supra*) it is said: "But there is another rule in equity relied on by the complainants, that is, that a trustee cannot be the purchaser of the estate of which he is a trustee, and that this is a general rule of public policy depending not upon the circumstances of the case, but upon general principles; that, however honest the circumstances of any individual case may be, the general interests of justice

require the purchase to be avoided in every case. But, notwithstanding the extent which is given to this rule, in English decisions, it is not there the rule without some limitation. In *Whelpdale v. Cookson*, 1 Ves. Sr. 9, Lord Hardwicke said, that if a majority of the creditors agreed to allow it, that is, a purchase by a trustee made for him by another person, he should not be afraid to make the precedent, and in *Campbell v. Walker*, 5 Ves. Jr. 678, the master of the rolls, afterwards Lord Alvanley, said: "that any trustee purchasing trust property is liable to have the purchase set aside, if in any reasonable time the *cestui que trust* chooses to say that he is not satisfied with it. In that case it was referred to the master to inquire whether it was for the benefit of the plaintiff that the premises should be resold. Also, in *Morse v. Royal*, 12 Ves. Jr. 385, a purchase made by a trustee was established under circumstances, so that the proposition is not universally true that at all times and under all circumstances, a sale made by a trustee to himself is void, and the broad rule which now seems to prevail in England, required years to bring it to its present maturity."

To this point see, also, *Williams on Executors*, 650, 938, 1843, and the notes; *Sugden on Vendors*, 391, 394, 399; 2 *Sugden's V. & P.* (eighth Am. ed.) 687, note a.

In jurisdictions where these sales are merely voidable it is held, that acquiescence by the parties in interest for a lapse of time, will operate to validate them (*Lyon v. Lyon*, 8 Ired. Eq. 201; *Brown v. Weaver*, 28 Ga. 377), and that what length of time will be sufficient to produce this result must depend upon circumstances, but that the heirs must, within a reasonable time, take steps to set the sale aside, in order to its invalidation. *Green v. Sergeant*, 23 Vt. 466; *Ives v. Ashley*, 97 Mass. 198; *Flanders v. Flanders*, 23 Ga. 249; *Musselman v. Ashleman*, 10 Penn. St. 394.

It is clear that the right to avoid such a purchase, as between trustee and *cestui que trust*, belongs alone to the latter. The trustee himself will never be allowed to reconsider his purchase by setting up for himself the unlawful nature of it. *McClure v. Miller*, 8 Hawks, 183.

In Louisiana and in New York, and in many other States, all sales made by sheriffs and constables, and in which they are interested, are declared void by statute. *Scott v. Gorton*, 14 La. 115; *Freeman on Void Judicial Sales*, § 33.

HOPE vs. WILKINSON.

[14 B. J. Lea, 21.]

SUBROGATION OF LEGATEE TO CREDITOR.

A legatee who has had his legacy abated or absorbed in payment of debts stands in the place of the creditor, and may proceed against undivided realty.

BILL to marshal assets.

T. L. Dodd and *G. B. Guild*, for complainants.

East & Fogg, Dickinson & Frazer, and *Smith & Allison*, for defendants.

FREEMAN, J. This case is as follows: Micajah Wilkinson died in Davidson county, in 1874, possessed of a large estate. He left a will by which he gave to complainants all his estate, both real and personal, but it was attested by only one witness, and therefore failed to be effectual to carry the realty; as to the personalty, however, it was good.

The administrators with the will annexed have proceeded to wind up the estate, and, the bill charges, have collected \$16,894, with a large amount still uncollected. They have also disbursed considerable sums in expenses of administration—five or six thousand dollars or more having been applied to payment of debts. While conceding that the general rule is, that the personalty is primarily liable for the payment of debts, it is claimed by the bill that where there is no devise of the realty, and it descends to the heir, the personalty being given, as in this case, then if the administrator uses the personalty in payment of debts, the legatee is entitled to stand in the place of the creditors whose debts have been paid, and go upon the undivided realty for reimbursement by subrogation. In other words, the theory of the bill is, that the ineffectually devised realty is the primary fund out of which the debts should be paid in preference to personalty bequeathed, as has been done in this case, and that the personalty having been applied to pay-

ment of debts, the legatee is entitled to be reimbursed to this extent by charging the realty descended with that sum.

The will of Micajah Wilkinson is as follows: "I give and bequeath to my friends, Blanche Knight, aged about thirteen years; Micajah Knight, aged about nine years; Ida Jane, aged about five years; Sallie, aged about four years; Tom Smiley, aged about one year, all my personal and real estate in the counties of Robertson and Davidson, and all other property of any description, both real and personal, bonds, notes, evidences of debt; and I specially desire and request that Elizabeth Knight shall have out of my estate the sum of two hundred dollars each year, over and above all other claims or creditors. I make this will as a matter of justice and affection."

A demurrer to this bill was sustained by the chancellor, on the ground that the will did not provide for the payment of the debts, that no particular fund was charged with their payment, and no part of the estate exonerated, and no intent indicated by the testator to change the legal order of appropriation of his assets in application to debts; therefore the personalty was the primary fund for their payment, and so complainants not entitled to relief. The referees, however, report in favor of a reversal of the decree, to which exceptions are filed opening the entire case.

That the personalty as a general rule is the primary fund for payment of debts at common law is beyond question, and this rule is adopted, if not emphasized, in our State by an act of 1827 (Thompson & Steger's Code, § 2267), requiring proof of "exhaustion of the personal estate in the payment of debts, before the real assets can be subject to unpaid debts, as against the heir." This is all clear.

We can give no effect whatever to the ineffectual attempt to devise the realty by this will, by way of learning the intention of the testator. Such an effort is not a legal expression of a purpose, and being ineffectual by law, must go for nothing in solving the question for decision. (*Hays v. Jackson*, 6 Mass. 156.)

At common law the realty was only chargeable in the hands of the heir with special debts. But under our system all debts

stand in equal degree, and are equally a charge on the legal or equitable assets of an intestate or testator—the principle, however, being still adhered to rigidly that the personalty is the primary fund for this purpose—the land only to be reached in the hands of the heir, in a proceeding under the act of 1827 (Code, § 5, cited) or by *sci. fa.*, in either of which modes, however, the heir is to be made party, with the right to show the personalty has not been exhausted, and to insist on its appropriation in exoneration of his estate, if he can do so.

In case there be a will, the same rule prevails, and the creditor is entitled to enforce his debt against the personalty at law in the hands of the representative, regardless of the provisions of the will, if by any process he can reach it. So that, under a judgment and execution in this case, a creditor could have appropriated the entire personalty to the payment of his debt, and the administrator would have been powerless to prevent. The debts then have been properly paid by the administrators in this case, as between them and the creditor. The question is whether there is an equity, by reason of such payment, as between the legatees and the heir, by which the former, whose legacies or bequests have been thus lessened, to have reimbursement out of the realty descended.

In the will before us, there is no exoneration of the personalty in terms from payment of debts, nor is any other fund charged with them. It is simply the case of a general bequest of the entire personalty to the parties named as the special objects of the testator's bounty, while the land descends to the heir, without any legal intention expressed in reference to it.

Courts of equity have established certain rules for marshaling the assets, and for their appropriation, by which the equities of parties are substantially met. The general principle that underlies these is that the assets shall be so appropriated that every claimant shall be satisfied, as far as such assets can, by any arrangement consistent with their respective claims, be applied in satisfaction thereof. (Story's Eq. J. § 561, vol. I.) If, for instance, a specialty creditor, whose debt in England was a lien on the real estate, receive satisfaction out of the personalty, a simple contract creditor, who had no claim, except on

the personal assets, shall, in equity, stand in the place of the specialty creditor as against the real estate so far as the latter has exhausted the personal assets in payment of his debts, and no further ; and this because the specialty creditor could go against both personal and real estate, or against either of them. "His *choice* to defeat the simple contract creditor, when he might have satisfied his debt out of the realty, is the basis of this equity." (Story's Eq. J. § 562, vol. I.)

"In general, legatees are entitled," says Judge Story, "to the same equities where the personal estate is exhausted by specialty creditors, for they would otherwise be without the means of receiving the bounty of the testator. They are, therefore, entitled to stand in the place of specialty creditors against real assets descended to the heir—so they are permitted, in like manner, to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage. But their equity will not prevail against a devisee of the real estate not mortgaged, for he also takes by the bounty of the testator ; and between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other." (Story's Eq. J. 565.) The principle underlying this is, that the bounty of the testator raises an equity in favor of a legatee that ought not to be defeated.

So, the bounty of the testator entitles a legatee to marshal the assets, and the choice of the creditors to proceed against the personal estate instead of the real estate descended, shall not preclude the payment of the legacy. (Wait's Act. & Def. vol. I, 353, for which is cited *Post v. Mackall*, 3 Bland, 486 ; *Mollan v. Griffin*, 3 Paige, 402 ; *Robards v. Wortham*, 2 Dev. Eq. 173, and other cases.)

This is the principle of the case of *Alexander v. Miller* (7 Heis. 77). Judge Deaderick says, quoting from Story's Eq. Jur. note 5 : "If there be *no devise* of the real estate, but it descends, if the creditor exhaust the personalty, then as against the *heir* the legatees may stand in the place of the creditors, and come upon the real estate which has descended." Further it is said, it is held that the mere bounty of the testator enables

the legatee to call for this species of marshaling; and so it was held in that case, irrespective of the question whether the legacies were specific or general, that the legatee had the right to go on real estate descended in the hands of the heir, where his legacy had been taken to pay debts.

The principle we think is sound, notwithstanding there be an uncertainty of decision on the question. The testator has, in the exercise of his legal right, given his personalty to a chosen object of his bounty. This gift is defeated by claims of creditors. Why should parties who take the realty by descent hold it free from debt, and thereby practically defeat the will of the testator?

The principle approved in the above case "that every will ought to be read, as in effect embodying the declaration by the testator that the payment of his debts shall be, as far as possible, so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention," is sound, and covers the question under consideration.

The question simply in such a case is, whether the gift of the testator is a legal and meritorious right, that should be protected, above the right of the mere heir on which the law casts the estate. We think the former the higher claim.

The principle cited from Story, that as between legatees and devisees under the same will, both being equally the object of the testator's bounty, there will be no marshaling, implies and rests on the proposition that the bounty of the testator raises an equity, and where it is shown equally as to both realty and personalty, the equities are equal, one counterbalancing the other. It is equally implied, that if there is a bequest, and no counterbalancing equity in the way of devise of the land, that the bequest itself would raise an equity superior in the legatee to the right of the mere heir.

So, in stating the doctrine on this subject, Mr. Pomeroy (vol. III, Eq. Jur. § 1135) says: "Property undisposed of by the will is primarily liable to debts, in preference to that which is expressly *bequeathed* or devised." We need but add, this equity is marked out in all ordinary cases by subrogation, that is, not by postponing the creditor in payment of his debt, but

by allowing the legatee who has had his legacy abated or absorbed in payment of debts, to stand in the place of the creditor as to undevised realty. (See Pom. Eq. p. 75, vol. III, note 6.) This is in accord with the case of Alexander, and we think is a sound equity as between the legatees and heirs. The result is, the decree below is reversed, the report of referees approved, and the case will be remanded for further proceedings.

BYERS *vs.* HOPPE.

[61 Maryland, 206.]

WILL IN FORM OF A LETTER.

A writing by deceased, over his signature, on the back of a business letter, ending "and, Ann. after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death," constitutes a valid will of personalty.

ACTION for the construction of a will.

William P. Maulsby, for appellants.

Charles B. Roberts and *Charles Marshall*, for appellees.

MILLER, J. By the decision on the former appeal in this case, reported in 60 Md. 381, it was conclusively settled that the paper writing propounded as his will or testament *was written and signed* by Mr. Hoppe, the alleged testator. But by that appeal the question whether this paper was *testamentary in its character* was not presented and, therefore, not decided. Further proceedings in the case were then taken, and, upon petition of the caveators, and against the protest of the caveatees, the Orphans' Court ordered three other issues to be transmitted for trial by a jury. From that order the present appeal has been taken by the caveatees. The issues are in substance as follows:

1st. Was this paper writing the complete and final last will and testament of the said Hoppe, and did he make and execute it as and for a last will and testament, and with the intention that the same should operate and take effect as such?

2d. If at the time he wrote this paper he did not intend it to operate as a last will or testament, did he subsequently recognize and adopt it as his last will and testament in its present shape?

3d. Is the said paper writing the last will and testament of the said John Henry Hoppe?

In view of what has already been determined in regard to this paper, the appeal from the order granting these issues presents in fact but one question, and that is, whether *its testamentary character* is to be decided by the court upon an inspection of the paper itself, and the interpretation to be placed upon the language it contains, or by a jury, upon proof to be submitted to them? That the paper in question was written and signed by Mr. Hoppe on the 9th of January, 1875; that it was so written to and for Mrs. Eliza Ann Byers, on one side of a half sheet of paper, on the other side of which he had written a business letter to John G. Byers and the said Eliza Ann Byers, his wife; that this letter was mailed by him to the said John G. Byers on the 11th of January, 1875; that it was received by the said Byers and wife, and preserved by them, or by the wife, until after the death of Mr. Hoppe, in January, 1881, and was then offered and propounded as his will by Mrs. Byers, are facts about which legal controversy can no longer exist. The business letter and the writing in controversy are both set out in the report of the decision on the former appeal. We give here only the latter, which is as follows:

"Ann, don't worry yourself about this matter, as you see you are almost cut out on every side, by your father and your mother, but you have been a faithful daughter to me, and have obeyed me, and you have seen a great deal of trouble; don't worry yourself, but take things easy and do the best you can for the present: I have prospered and have accumu-

lated a great ——— of money together, and I intend to do what I please with it; and Ann after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death; Ann keep this to yourself.

“J. HENRY HOPPE.

“*To Eliza Ann Byers.*”

In our opinion these concluding sentences: “And Ann, *after my death* you are to *have* forty thousand dollars; this you are to have, *will or no will*; take care of *this until my death*,” accompanied with the direction, “To Eliza Ann Byers,” evince just as effectually, in legal contemplation, that the writer wrote them *animo testandi*, as if he had said in terms, “I hereby will and bequeath to Eliza Ann Byers forty thousand dollars, to be paid to her at my death out of my personal estate.” There is nothing to indicate that he intended to make this bequest by a will to be thereafter executed, and that it was not to take effect unless such a will was made. The plain terms are: “You are to have forty thousand dollars after my death,” not by a will which I intend to make giving you that sum, but “you are to have it will or no will;” and he then directs her to “take care of this until my death,” that is, to keep *this writing* as the *instrument* which makes and evidences the gift. It is also an instrument *complete* on its face, and being written and signed by the testator, it possesses all the requisites of a valid will of personal property. There is nothing incomplete or unfinished about it. It exhibits no uncompleted formality which the testator may have supposed was essential to its validity. No blanks are left as to the amount intended to be given, or the party intended to be benefited, nor does it contain a clause appointing an executor with a blank left for the name, or an attestation clause without witnesses, or any similar imperfection. It is not necessary to the validity of a will that it should contain the appointment of an executor, or that it should dispose of all the testator's estate, real or personal, nor does the omission to make such appointment, or the failure to dispose of the entire estate, afford any evidence whatever of an absence of the *animus testandi*,

where the instrument is complete on its face, and professes in direct and explicit terms to dispose of only a part of the testator's property. If, then, this paper is thus complete on its face, and the *animus testandi* thus appears from the language it contains, how can parol evidence be admissible before either a court or a jury in order to determine whether it was written as and for a last will or testament, and with the intention that it should operate and take effect as such? It is not alleged or suggested that it is a sham, or the offspring of a jest, or the result of a mere contrivance to effect some collateral object, and never seriously intended as a disposition of property, as was the case in *Lester et al. v. Smith et al.* (3 Swabey & Tristram, 282), or that it was written by Mr. Hoppe as a specimen of how short a will he could write, as was done in the case of *Nichols v. Nichols* (2 Phillimore, 180). Again, if the instrument is such as we have pronounced it to be, it is plain that parol declarations of the testator (if he ever made them) that he never intended it should operate as a will, or that he intended to make a will giving all his property to other parties, could not be availed of by the caveators, because our statute law declares that "No will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing thereof read unto the testator and allowed by him, and proved to be so done by three witnesses at the least." (Code, Art. 93, Sec. 303.) In all the reported decisions of this court bearing upon this subject, the alleged wills, differing widely in that respect from the instrument now before us, appeared in an imperfect and unfinished state; and in every one of them where parol declarations of the decedent were resorted to and admitted, it was for the purpose of ascertaining whether he intended it should operate as a will in the shape in which it was.

In *Tilghman et al. v. Stewart et al.* (4 H. & J. 156), the paper contained blanks for the names of legatees as well as for its date. It was not signed, though it had been written by the

alleged testator. It professed to dispose of real as well as personal property, and there was an attestation clause without witnesses. The effort was to set it up as a will of personalty, and the declarations of the decedent were admitted, but a majority of the judges held the evidence to be insufficient, and reversed the order of the Orphans' Court admitting it to probate. In the opinion of Martin, J., one of the majority, it was said that to constitute a good will of personal property "the paper must either be *complete on the face of it*, or must be supported by parol evidence. It must appear from circumstances, or the declarations of the deceased, that it was intended to operate as his will in its imperfect and unfinished state. *If it be complete on the face of it, it requires no adventitious aid; it is full evidence in itself of the intention of the testator.* But if incomplete and unfinished, and other acts are evidently required and *intended to be done* to give it full authenticity and completion, in my opinion, it cannot be received as a will even of personal property, unless evidence is produced to satisfy the court that it was intended to operate as such, in its imperfect and unfinished state. This, I conceive, is not, as was suggested by counsel, a new doctrine, but has been recognized and acknowledged from the time of Swinburne to the present day." The law as thus stated has been approved and reiterated in every subsequent case in which the same or a similar question has arisen.

Boofter v. Rogers (9 Gill, 44) was tried before a jury upon issues, and the paper consisted of instructions or memoranda written by the deceased to enable his scrivener to prepare his will. It was held that such a paper might be made a will by subsequent adoption, or, if the more formal will was left unfinished by reason of any act which the law pronounces to be the act of God, provided there was a continuance of the intention down to the time such act intervened; and it was for the purpose of determining these questions that the declarations of the deceased were put in evidence.

In *Plater v. Groome* (3 Md. 134) the paper was a codicil disposing of both real and personal property. It contained the usual attestation clause, but there were no witnesses, and

it was not signed, nor were the blanks for the date filled up. The alleged will in *Barnes v. Syester* (14 Md. 507) was of like purport, and contained the same defects, except that it was signed as well as written by the deceased. In that case the declarations of the deceased were admitted and used, but the court, in a very able opinion delivered by Tuck, J., in which the English as well as the Maryland decisions are reviewed, held that the evidence was not sufficient to overcome the presumption arising from the imperfect condition of the paper that the deceased intended to do some further act to complete it, or to show that she was prevented from finishing it by the act of God.

In *Harris v. Pue, Adm'r, &c.* (39 Md. 535), the only defect consisted of blanks as to the amounts to be given to three named legatees. In other respects the instrument was, on its face, a good will of personalty, and the court held that the declarations of the deceased, with the other evidence in the case, clearly showed that he intended the paper as it stood to operate as his will.

Mason et al. v. Poulson, Adm'r, &c. (40 Md. 355), was another case tried before a jury on issues. The reporter has omitted to set out the paper or give any description of it. It was not signed, though written by the alleged testator whose name appears in the commencement of it. In the first clause, he says: "It is my will that all my just debts and funeral expenses shall be paid by my executors hereinafter named, out of my estate, as soon after my decease as by them, my executors, shall be found convenient," but there was no subsequent clause appointing executors. There were also several erasures and interlineations in pencil. It was cut to a considerable extent in one place, and bore other marks of defacement and partial mutilation. It was alleged to be incomplete and unfinished as a testamentary paper, and that it was intended simply as a memorandum for a complete will to be thereafter written and reduced to form, with such additions and alterations as the deceased might choose to make. There was proof on one side that he declared it was a "schedule" which he wished to have perfected by a formal will, and that he

intended to make an additional legacy, and also to appoint an executor; and, on the other, that, though such had been his intention at one time, yet, shortly before his death, he said he was satisfied with it as it stood. This is the case from which, as the appellees' counsel say in their brief, two of the issues in the present case were taken. They may have been misled by the imperfect report of the case, but an examination of the record, and of the *original paper* which was before us when the case was argued, will show that it was manifestly imperfect and incomplete on its face, and altogether unlike, in this respect, that in the present case.

In *Devecmon v. Devecmon* (43 Md. 335) the paper which disposed of both real and personal estate, was written, signed, and sealed by the deceased, and was complete in all respects, except the failure to execute it in the presence of witnesses. The court admitted that as there was an attestation clause appended by the testator himself, the presumption was that he intended to execute the paper in the presence of witnesses, and that it was incomplete in his apprehension of it, even as a will to pass personal estate; but held that such presumption was one of fact only, which could be rebutted or repelled by extrinsic evidence. The proof was conclusive, from his declarations repeatedly made, that he regarded the will, in its present shape, as sufficient to pass his personal estate, and he distinctly declared that it was his will for that purpose. It was, therefore, admitted to probate as a good will of personalty.

In *Lungren v. Swartzwelder* (44 Md. 482) the paper was more of an inventory of property than anything else, and so far as it referred to any intended testamentary disposition, it indicated a mind in as hesitating and undecided a state as could well be imagined. It did not rise to the dignity of memoranda or instructions for the preparation of a will. There was no evidence of any acts or declarations of the deceased clearly showing that he intended this paper, as it stood, to be his will, or that he subsequently recognized or adopted it as such, and it was refused probate.

In this notice of our Maryland decisions, we have not ad-

verted particularly to the cases of *Weems v. Weems et al.* (19 Md. 349) and *Morsell et al. v. Ogden, &c.* (24 Md. 377), because they merely re-announce the law as laid down in *Tilghman v. Stewart*. We have made this review of the cases in order to show that the instruments passed upon in all of them were in an unfinished and imperfect state. They were all conceded to be imperfectly executed or defective instruments. On the other hand, if the paper be perfect on its face and validly executed, and if, by its terms, it discloses that it was written *animo testandi*, it must, if voluntarily made by a competent testator, stand as his will unless superseded by a later one, or revoked in the mode pointed out by the statute. In such case parol declarations of the deceased can never be received for the purpose of revoking, or altering, or in any way preventing the instrument from operating as a will; and for this no other authority need be cited than the recent decision of this court in *Sewell v. Slingluff*, 57 Md. 537. We have examined the English cases referred to by the appellees' counsel in their briefs, as well as many others, and find that they all concur in stating the law to be as it is announced and adopted in the Maryland cases above cited. We find no contrariety of opinion or diversity of views upon the subject, and therefore deem it unnecessary to protract this opinion by a special reference to, or review of those cases.

If we are right in the views thus expressed, it follows that there was not only no necessity but no ground for the granting and trial of issues in this case. In fact, the petition of the caveators states no reason why they should be granted beyond the general denial that the paper is, according to its true legal construction and interpretation, the will or testament of the deceased, and the general averment that he did not make and execute it as and for a will and testament, and with the intent that the same should operate and take effect as a will. The only disputed question of fact which we can conceive could legitimately arise in the case has already been disposed of and settled by the verdict of a jury. From an inspection of the paper itself, and giving its terms their true legal construction and interpretation, this court now pronounces it to be clearly

and unequivocally testamentary in character. The result, therefore, is that the order appealed from must be reversed, and the cause remanded to the end that this paper writing may be admitted to probate as a will of the deceased disposing of a part of his personal estate.

Order reversed, and cause remanded.

The first trial of above case reported in 3 Am. Prob. R. 499. As to what constitutes a valid will, though informally drawn, see *Miller v. Holt*, 1 Am. Prob. R. 199; *Armstrong v. Id.* Ibid, 206; *Cowley v. Knapp*, Ibid. 390; *Fosselman v. Elder*, 2 Id. 541; *Castor v. Jones*, 3 Id. 148.

PORTER vs. JACKSON.

[95 Indiana, 210.]

LEGACY.—PERSONAL CHARGE ON DEVISEE.

The acceptance of a devise of realty by one who is directed to pay a legacy imposes on him a personal obligation to discharge the legacy, which may be enforced without resort to the land.

ACTION to quiet title.

F. Winter, J. D. Miller and *F. E. Gavin*, for appellant.

W. A. Moore, M. D. Tackett, B. F. Bennett, J. K. Ewing and *C. Ewing*, for appellees.

ZOLLARS, J. The will of William Jackson was probated in 1869. By this will the testator gave to his wife all of his property, real and personal, so long as she should remain his widow. Upon her marriage or death the property was devised to his seven children, one-seventh to each. The will contained the following provision: "I further will that, as a condition of the acceptance of the property thus devised to my heirs, they,

on their part, shall support and maintain Eliza Andrews, during her natural life, or until she shall marry."

The widow died intestate, in March, 1882. There was no administrator upon the estates of the testator nor widow.

It does not appear that any of the personal estate came into the hands of the devisees. After the death of the testator, Mrs. Clark, a daughter and one of the devisees, died intestate, leaving surviving a husband and six minor children. In April, 1882, appellee Samuel L. Jackson instituted an action for a partition of the land devised. All of the living devisees, and the said heirs at law of Mrs. Clark, were made parties defendants. Eliza Andrews was not a party. An interlocutory judgment was made, fixing the rights and interests of the several parties to the action, and ordering a partition. Subsequently, such proceedings were had that a commissioner was appointed to sell the land. Under and pursuant to the order of court, the commissioner had the land appraised as unencumbered, and on the 27th day of October, 1882, sold the same, at public sale, for the full amount of the appraisement, viz., \$5,425. Appellant was the purchaser. The sale was reported to and confirmed by the court in December, 1882. At that time a deed to appellant was ordered, executed by the commissioner, and approved by the court. The proceeds of the sale were in the hands of the commissioner when this action was commenced. Prior to the commencement of this action, a controversy arose as to the proper construction of the will. Eliza Andrews claimed that the will made her support a charge upon the land, although she had the right also to look to the devisees personally. The devisees claimed that the land was the primary and only fund to which Eliza Andrews could look for such support.

Appellant claimed that the land is not liable at all, having been sold and he having purchased without actual notice, and that, if liable at all, it is only in the way of security, and that the legatee, Andrews, must resort first to the personal liability of the devisees and the fund in the hands of the commissioner.

These are the facts, substantially, as set up in appellant's

complaint. In addition to these facts, it is charged in the complaint that the devisees living and the heirs of Mrs. Clark, are all insolvent, and that some of them are intending to remove from the State.

This action was commenced against the devisees living, the heirs of Mrs. Clark, and Eliza Andrews, to quiet the title to the land as against all claim for the support of the legatee Andrews, and to charge that support upon the devisees and the fund in the hands of the commissioner. The main purpose of the action, as shown by the complaint and the argument of appellant's counsel, is to charge the support upon the fund thus in the hands of the commissioner, and to require the devisees, if allowed to draw the fund, to give bond that the amount of it shall be applied to that support, if required; or that the court appoint a receiver to take charge of the fund for the benefit of the legatee. After the commencement of this action, Eliza Andrews was adjudged insane, and a guardian appointed for her. The guardian was made a party defendant. Demurrers to the complaint were filed by all of the defendants, which were sustained.

Do the facts stated make a case for any such relief as is asked? To narrow the case to the real question discussed by counsel, and the only one we need decide on this appeal, has appellant, upon the facts stated, a right to an order and decree for the retention of the funds in the custody of the court, for the support of the legatee, or has he a right to an order and decree, that in case the devisees are allowed to receive that fund, they shall give a bond or bonds that it shall be applied to the support of the legatee, if required?

We learn from appellees' answer to appellant's assignment of errors in this court, that since this appeal was taken the commissioner has made his final report to the court below, in which he states that appellant purchased of two of the devisees their interest in the fund, arising from the sale of the land, and retained out of the purchase-money for the land, the amount of the interests thus purchased. We do not think that this is sufficient to bar the appeal. Nor do we think that this fact would have affected appellant's right to the relief asked, had it ap-

peared in the complaint, if he was otherwise entitled to such relief. As to whether or not, in any possible future controversy, the purchase from the devisees may affect rights as between them and appellant, we need intimate no opinion.

The will, as we have seen, provides that as a condition of the acceptance of the property devised, the devisees shall support and maintain Eliza Andrews. The rule is well settled that, where real estate is devised to the person who, by the will, is directed to pay a legacy, such legacy is an equitable charge upon the real estate so devised. (*Lindsey v. Lindsey*, 45 Ind. 552; *Wilson v. Piper*, 77 Ind. 437; *Cann v. Fidler*, 62 Ind. 116; *Wilson v. Moore*, 86 Ind. 244; *Castor v. Jones*, 88 Ind. 259; *Nash v. Taylor*, 83 Ind. 347.)

This is conceded by counsel in this case. It is further conceded, in argument, that as the will was probated and of record, and as Eliza Andrews was not a party to the partition proceedings, the equitable charge for her support was not destroyed by the sale to appellant.

We think it equally clear that the acceptance of the property, under the will, imposed a personal obligation upon the devisees to furnish the support to the legatee, and that she may enforce that obligation by a suit, and recover a personal judgment. The acceptance of the property under the will implied a promise to furnish the support. That support seems to have been the consideration for the property devised. It is expressly made the condition to the vesting of the title to the property. It seems to be plain that the testator intended to impose a personal charge upon the devisees.

In the case of *Harris v. Fly* (7 Paige, 421), which arose under a will similar to that under consideration, Chancellor Walworth, in speaking of the legacy, and the liability of the devisee, said: "By the will, the payment thereof is charged upon him personally; and he has received the land as an equivalent for the payment thereof, although for the protection of the rights of the legatees, this court gives them an equitable lien upon the land itself as an additional security." This case was cited and approved by this court in the case of *Lindsey v. Lindsey* (*supra*). The same doctrine was held in the case of *Cann v. Fidler* (*supra*).

The case of *Burch v. Burch* (52 Ind. 136) was an action by a legatee against a devisee of the land for the amount of the legacy. It was held that while the legacy was a charge on the land devised, the devisee was also personally liable upon an implied promise to pay. See, also, the cases cited in this case. (*Dodge v. Manning*, 11 Paige, 334; s. o. 1 N. Y. 298; *Elwood v. Deifendorf*, 5 Barb. 398; *Fuller v. McEwen*, 17 Ohio St. 288.)

In the case of *Towner v. Tooley* (38 Barb. 598), which arose under a will similar to that under examination, it was said that the legacies were an equitable charge on the land, but that before resort could be had to the land the personal property of the devisee should be exhausted.

The case of *Lofton v. Moore* (83 Ind. 112) was between the legatee and devisee, and arose under a will which, in specific terms, bound the real estate devised for the payment of the legacy. The holding was that the devisee was personally liable, and that the legatee might, in the first instance, proceed to collect the legacy by enforcing the lien upon the land.

The case of *Brown v. Knapp* (79 N. Y. 136) arose under a will similar to that in suit. It was said that, "If the devisee accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay."

Under the provisions of the will, and in the light of the above authorities, we think it is very clear that the devisees are personally bound to furnish to Eliza Andrews the support provided in the will, and that she may enforce that liability by suit, even beyond the value of the land devised if necessary, and without resorting to the land at all, if the amount can be made by such suit or suits. Whether the devisees could compel her to thus resort to their personal liability before having resort to the land, if they still owned it, we need not decide.

We think it clear, also, that the charge upon the land remains an equitable charge upon the fund in the hands of the commissioner and in the custody of the court, and that she may enforce that charge. Especially is this so, as the devisees are liable beyond the value of the land, and are insolvent. She may enforce the personal liability against the devisees, and still look to the land if necessary. (See analogous cases, *Gimbel v. Stolte*, 59 Ind. 446; *Clyde v. Simpson*, 4 Ohio St. 445; *Milligan v. Poole*, 35 Ind. 64; *Harris v. Fly*, *supra*.)

The case last cited involved the rights of parties under a will substantially like that before us. The devisee had suffered the land devised to be sold by the sheriff on an execution. After the purchaser had received a deed, he mortgaged the land. In an action to foreclose the mortgage, the legatees were made defendants. It was held that the legacies were a lien upon the land, and that the legatees were entitled to be paid their legacies out of the proceeds of the sale of the land.

May appellant compel Eliza Andrews to resort to and exhaust that fund before having resort to the land? It would seem that, upon principles of equity and good conscience, he ought to have that right. As we have seen, the devisees personally owe the duty of furnishing support to the legatee. They received the land devised as a compensation for such support. They held the land charged as security for that support. Appellant has paid the full appraised value of the land, without reference to any charge upon it, and, so far as shown, without actual notice. The devisees are insolvent, and hence, at this time, either the fund in the custody of the court, or the land in the hands of appellant, must bear the burden of the support. As between appellant and the devisees the equity seems clear. No possible harm can come to the legatee by charging the fund as the primary fund for her support. On the other hand, it may result in a positive advantage to her.

In the case of *Clyde v. Simpson* (*supra*) it was held that the purchaser of the land from the devisees not only had the right, but that it was his duty to see to it that the purchase-money was applied in payment of the legacy, in order to protect his land.

The case of *Dodge v. Manning* (11 Paige, 334), cited in

Lindsey v. Lindsey and *Burch v. Burch* (*supra*), arose under a will substantially like that before us. The devisee became the owner under the will of both real and personal property. He mortgaged the real estate. The mortgage was foreclosed, and the property sold. A portion of it was purchased by a third party, with notice, and a part was purchased by the devisee. The legatee filed a bill to enforce the charge on the lands. It was held that while the legacy was a charge on the land, the personal estate bequeathed was the primary fund for the payment of the legacy, that the devisee was personally liable, and that the portion of the land purchased by him, at the master's sale, should be charged and sold for the payment of the legacy, before the legatee could have recourse upon the land purchased by the third party. As to that party the bill was dismissed.

This same case came before the Court of Appeals, and is reported in 1 N. Y. 298. The decision was the same, except that part dismissing the bill. The court said: "But the devisee, by accepting the real and personal estate devised and bequeathed to him, became personally liable for the payment of the legacies which the will directed him to pay. He is therefore primarily liable, and the remedy should first be exhausted against him and the real and personal estate of the testator remaining in his hands, before the respondents should be charged in respect to the real estate purchased by them. If they had purchased expressly subject to the payment of the legacy, that of itself might have made the estate in their hands directly and primarily chargeable. But I concur with the chancellor, that there is nothing in the evidence to justify the inference that they purchased in that manner. The admission in their answer, as well as the evidence, merely shows that they had notice of the existence of the legacy. * * * But as the chancellor's decree directs the bill to be dismissed, as to the respondents, with costs, it should be reversed, and a decree should be entered charging the lands purchased by them with the payment of the legacy and costs of suit, so far as there may be a deficiency after the appellant shall have exhausted her remedy

against the defendant, John B. Borst." Borst was the devisee.

In the same case, in speaking of the rights of the legatee, who was complainant and purchaser, Jewett, C. J., said: "But as between the complainant and the defendants, * * * they have an equitable right as against her, to insist that she shall first exhaust her remedy, not only as against Borst personally, but as against that portion of the property, real and personal, remaining in his hands, or to which he is entitled, before she can enforce her lien as against that portion of the property purchased by them on the sale under the mortgage foreclosure." On this point see, also, the case of *Towner v. Tooley* (38 Barb. 598) already cited.

In the case of *Elwood v. Deifendorf* (5 Barb. 398), heretofore cited, it was held, under a will which devised the land charged with the payment of the debts of the testator, that the devisee, by accepting the land, became personally liable to pay the debts; that the remedy of the creditors must first be exhausted against the devisee personally, before their lien could be enforced against the portion of the land in the hands of the alienee of the devisee, and that the real estate was liable in the inverse order of its alienation. (See, also, 2 Story's Eq. sec. 1127.)

Many other cases might be cited in support of the equitable doctrine of the above cases. There is clearly no principle of equity that the devisees can invoke in support of their claim, that they shall receive the purchase-money for the land, and leave the whole burden of the support of Eliza Andrews to rest upon that land and the purchaser of it. Nor can any equitable or other good reason be given why the legatee should not be compelled to look to the fund in the custody of the court before resorting to the land in the hands of appellant. Neither the record nor counsel inform us that she objects to this. Her demurrer was filed, possibly, because of one prayer of the complaint for the quieting of the title to the land against the charge on it for her support. However this may be, we think that appellant has the right, as against her and the devisees, to have that fund first exhausted, if necessary, in her support, be-

fore resort shall be had to the land which he purchased in good faith, and for full value, and he is entitled to such an order and decree as will accomplish this, either by good and sufficient bonds of indemnity from the devisees, or the appointment of a receiver to take and hold the fund now in the custody of the court. Having purchased the interest of two of the devisees, appellant will hold the amount subject to its proportionate share of the support of the legatee. As to her it is secure, being a charge upon the land. In answer to this, the position of the appellees is that the sale under the partition proceedings was a judicial sale in which there was no warranty, and in which the doctrine of *caveat emptor* applied; and that, therefore, appellant's land must stand for the support and maintenance of the legatee, to the exoneration of the devisees.

We have a line of cases which hold that there is no warranty in judicial sales, and apply the doctrine of *caveat emptor*. But these cases, we think, have not such scope as to overthrow the equitable doctrine we have announced, in its application to this case. On the other hand, we have a line of cases extending from the case of *Muir v. Craig* (3 Blackf. 293) to the case of *Short v. Sears* (93 Ind. 505)—over a period of fifty years—which hold that a purchaser of land at a sheriff's sale, to which the judgment defendant has no title, or where the sale is void, may recover from the judgment defendant the amount so paid, or be subrogated to the rights of the judgment creditor. The same rule has been applied to other judicial sales. (See *Muir v. Berkshire*, 52 Ind. 149; *Westerfield v. Williams*, 59 Ind. 221; *Willson v. Brown*, 82 Ind. 471.)

This line of cases rests upon principles of equity, and is more analogous to the case in hearing than those relied upon by appellees. In this line the doctrine of *caveat emptor* has not been so extended as to deny a remedy against him who is the real debtor, or who owes the duty.

It has been suggested that there is an apparent conflict between this line of cases and the other, which cannot be readily reconciled on principle. (*Weakley v. Conratt*, 56 Ind. 430.) The observation made by Mr. Justice Worden, in that case, may be applied generally. It will be observed, upon an examination

of the two lines of cases, that, generally, protection was given or denied to the purchaser, as the vendors, or those interested as vendors, did or did not owe the debt or duty.

The case of *Henderson v. Whiting* (56 Ind. 131) is based upon this principle. In that case the land was sold by the administrator. The purchaser defended against one of the notes given for the purchase-money, on the ground that when he purchased the land it was encumbered with taxes which he had been compelled to pay. The holding in the case, in effect, was that if the taxes had accrued during the life of the intestate, they would have been a charge against him, which it would have been the duty of the administrator to pay, and that, in such case, the purchaser might have availed himself of his payment of them as a defense.

Without further extending this opinion, it follows, from the conclusion we have reached, that the demurrer to the reply must be carried back and sustained to the answer filed in this court, and that the judgment of the court below must be reversed. The judgment is therefore reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

See *Lofton v. Moore*, 3 Am. Prob. R. 164.

ELLICOTT vs. CHAMBERLIN.

[38 New Jersey Equity, 604.]

AGREEMENT TO RENOUNCE EXECUTORSHIP.

An agreement upon consideration to renounce an executorship is illegal as against public policy.

Surr in equity to restrain action at law on note given in consideration of a renunciation by payee of an executorship.

E. P. Conkling and *J. G. Shipman*, for appellant.

O. P. Chamberlin and *J. N. Voorhees*, for respondents.

PARKER, J. Elisha Warford executed his will on the first day of November, 1862. By the residuary clause he gave to the appellant (who was his only child) all the residue of his estate, both real and personal, to her sole and separate use, to keep the lands devised to her, or have them sold by the executors named in his will, as she saw fit. The persons named therein as executors were George A. Allen and Amplius B. Chamberlin.

On the 4th day of February, 1868, Mr. Warford executed a codicil to his will, by which he appointed Holcombe Warford as executor in place of Mr. Allen. The codicil differed from the will chiefly in its residuary clause, which *directed* the executors to sell all the residue of the personal and real estate and convert it into money, to be invested by them in city and railroad stocks for the benefit of Mrs. Ellicott during her life. Under this clause they could sell and invest without reference to her wishes.

The testator died in May, 1872, and at the time of his death he was over eighty-seven years of age.

Amplius B. Chamberlin, one of the persons named as executors, was a personal friend of the testator, with whom he had been on very intimate terms for many years, and in whom he reposed much confidence. The will and codicil were executed at his residence, and remained in his possession continuously from the time they were executed until he produced them for probate.

When Mrs. Ellicott was informed of the contents of the codicil, she was dissatisfied, because of the absolute power given to the executors by its residuary clause. She filed a *caveat* against the probate of both the will and codicil, and pro-

ceedings were instituted before the Orphans' Court to test their validity.

During the pendency of those proceedings, Mrs. Ellicott was informed that Mr. Chamberlin had said he expected to realize a large profit through the power of sale and investment given him by the codicil. When Mr. Nixon, on behalf of Mrs. Ellicott, served a notice on him, he said he would let her settle the estate if she would give him \$25,000. He also told Mr. Nixon that he could make that much money out of it. He told Mr. Tunison he could make \$15,000 or \$20,000 in settling the estate. When Mr. Tunison asked him how, he replied that he would sell off certain farms, get the money for them, and put it in railroad and city bonds, that there would be a large premium on them, and he would have the premium. These boasting declarations of contemplated improper administration of the estate on the part of Mr. Chamberlin for the purpose of making profit for himself out of his trust, came to the ears of Mrs. Ellicott. He did not hesitate to make the same declarations substantially to Mrs. Ellicott herself. Her son Benjamin says that on more than one occasion he heard Mr. Chamberlin say to his mother, when asked whether he had any interest in the estate more than his lawful fees and commissions, that he could make \$20,000 in settling the estate, selling the different pieces of property, and investing the money as directed in the codicil, and that he would do it. Influenced by these and other similar expressions of Mr. Chamberlin, which came to her knowledge, Mrs. Ellicott became anxious to have him renounce his executorship, and negotiations were opened with that end in view. After numerous interviews between the parties on the subject, it was agreed that Mr. Chamberlin would renounce upon payment to him of the sum of \$10,000, together with costs and counsel fees. On the 28th of March, 1874, he signed a formal renunciation. The other executor also renounced, but without any compensation, or promised remuneration therefor. The *caveat* was withdrawn, and Mrs. Ellicott, who has acted as administratrix *pendente lite* since the filing of the *caveat*, was appointed administratrix *cum testamento annexo*.

Mrs. Ellicott, in fulfillment of the agreement, paid Mr. Chamberlin, for counsel and costs, over \$1,000. She also paid him, at one time, in cash, \$200, and at another time \$150, on the agreement. In March, 1874, she paid him \$4,611 88, and he gave her a receipt, in which he acknowledged the payment of that sum, "on account of my renunciation as executor of the last will and testament of Elisha Warford, deceased." As part of the payment last mentioned, Mrs. Ellicott assigned to Mr. Chamberlin a bond and mortgage given to her by Peter A. Yawger, for the payment of \$1,300. The payments hereinbefore mentioned made up the sum of \$5,000, and for the remaining \$5,000 she gave him a promissory note, dated March 23th, 1874, payable on or before the 1st day of April, 1875, with interest from the 1st day of April, 1874. On the 2d of January, 1875, there was paid on this note the sum of \$2,500, and also one year's interest. No other payments have been made on the note, or on the agreement from which the note originated.

Amplius B. Chamberlin died in the spring of 1879. His executors (the respondents), soon after his death, commenced an action in the Circuit Court of the county of Hunterdon, to recover the balance of said note, whereupon Mrs. Ellicott filed a bill in the Court of Chancery to restrain the suit on the note. The bill also prays for a decree compelling the executors of Amplius B. Chamberlin not only to surrender to her the said note, but to repay her the money she has paid on the same, and also the money she has paid on the contract for renunciation of the executorship, and to re-assign to her the Yawger bond and mortgage.

The chancellor dismissed the bill, and from his decree Mrs. Ellicott appeals.

There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violat-

ing or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives, but he has no right to make merchandise of the confidence reposed in him by a testator.

In the case of *Porter v. Jones*, reported in 52 Mo. 399, it was held that a promissory note, whereof the consideration was an agreement to resign as administrator, with the view of having another appointed, was void as against public policy. The court said, in that case, that the agreement amounted to trafficking with an important trust; and, although an administrator was not a public officer, yet he held a private trust as sacred.

In *Staunton v. Parker* (19 Hun, 55) it was decided that an agreement to renounce an executorship for a consideration was void. The matter came before the court on appeal from an order of a surrogate, holding the renunciation invalid. The court, in its decision, adopted the language of the surrogate, who said, "that an executor had the undoubted right to renounce, of his own motion, but a renunciation for a consideration, a renunciation purchased in any manner, is another matter. If agreements of this nature are to be enforced, then testators may well doubt, not only as to who will carry out their wills, but whether they will be carried out at all. The door might then be opened to fraud and corruption on the part of designing men and intriguing descendants, and to imposition on confiding testators."

A trust is regarded as a matter of honor and conscience, and not to be undertaken with mercenary views. (*Manning v. Manning*, 1 Johns. Ch. 527.)

In the case last cited, the chancellor, in discussing the question of commissions and compensation to trustees in general, observed "that if the rule applied with more force and propriety to one kind of trust than another, it was that of an executor who gives no security and who is selected by reason of some special and sacred confidence, resulting from ties of kindred or friendship, and charged by the testator in his dying moments with interests of the greatest human concern,

and which the testator is on the eve of renouncing forever. The request of a testator in such case is the supplication of a friend."

I cannot conceive of anything more likely to undermine confidence, and more directly opposed to public policy, than to allow the partiality and friendship of testators, manifested in choosing those whom they wish to settle their worldly estates, to be made the subject of merchandise. There could not be a more marked violation of trust than such traffic.

On the part of the respondents it is urged that the whole sum of \$10,000 was not paid to procure Mr. Chamberlin's renunciation of the executorship, but that the money was to be paid in part for services he had rendered the deceased, for advice and assistance to be given Mrs. Ellicott in settling the estate as administratrix with the will annexed, and for going on her bond as one of the sureties. The evidence does not sustain this view, but shows that the money was to be paid wholly for the renunciation. But even if services performed, or to be performed, on the part of Mr. Chamberlin, had entered into the contract, it was void. A contract is void if only a *portion* of the consideration is illegal as against public policy. It has been held that a contract based wholly or *partly* on an agreement of a trustee of a corporation to resign his trust for a consideration, is illegal. He may resign when he chooses, but he must not make any profit to himself by his resignation. (*Forbes v. McDonald*, 54 Cal. 98.)

It was the duty of Mr. Chamberlin either to renounce voluntarily, without consideration, or to endeavor to prove the will and codicil; and, after the *caveat* was withdrawn, to assert his rights as executor and proceed with the settlement of the estate entrusted to him by the testator. Instead of doing this, proceedings to probate the will and codicil were delayed, and he entered upon the effort to sell his trust. The price demanded at first was enormous, and the price obtained at the close of the barter was exorbitant. He could not possibly have been allowed one-third of the amount he received, in commissions, if he had settled the estate. He performed

no service and incurred no risk. It is not the amount of the profit that determines the illegality, for a trustee is not allowed to make any profit out of his trust. The old English rule was to deny even commissions, on the theory that a trusteeship was a matter of honor not to be compensated by money.

In New Jersey, commissions are given by statute, which, while it fixes the rate beyond which they will not be allowed, also provides for their forfeiture for misconduct, or by neglect to state and settle accounts within the time limited, so that it cannot be said that an executor is entitled to any compensation until his duties have been fully performed, and allowance has been made by order of the court.

There is no doubt that Mrs. Ellicott could have successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defense. But she chose voluntarily to pay the greater part of the money, and she cannot now recover what she has paid. She was a participant in an illegal contract for the purpose (as the evidence shows) of obtaining for herself the administration of the estate.

If a contract be illegal as against public policy, its invalidity will be a defense while it remains unexecuted. If the illegal contract be in part performed and money has been paid in pursuance of it, no action will lie to recover the money back. (Smith on Contracts, 259.)

The law will not assist either party to an illegal contract, and the parties being *in pari delicto*, it will leave them where it finds them. If the contract be still executory, it will not enforce it, and, if already executed, it will not restore the price paid nor the property delivered. (*Settler v. Alvey*, 15 Kan. 157.)

Mrs. Ellicott cannot, therefore, compel the repayment of the money she gave Mr. Chamberlin on the agreement or on the note, nor can she compel the assignment to her of the Yawger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed, but she can resist the payment of the balance of the note, for which suit has been

brought. Her defense to the note can, however, be made in a court of law, and, therefore, the suit in the Circuit Court, already commenced, should not be enjoined.

The bill was properly dismissed by the chancellor, without costs.

The appellant will not pay costs in this court.

The decree is affirmed.

Decree unanimously affirmed.

An agreement for a consideration to renounce an executorship is illegal.—Where a testator appointed two trustees and executors, but by a codicil substituted two others, and one of the latter, in consideration of £75 paid him by one of the excluded trustees, resigned his trust and executed a deed appointing the excluded trustee in his place, the court held, that the trustee so attempted to be appointed should be removed, the deed cancelled and the £75 form part of the assets. The court said: "This is a very extraordinary case. There are cases on record in which a trustee has paid money in order to induce other people to act with him in the execution of a trust, and in which he has been allowed the money so paid. I do not remember a case where the office of a trustee has been purchased for money. H. abandoned his duty and office as trustee for a valuable consideration, and made over the trusteeship to a person who was deliberately excluded from that office by the testator. Such a transaction, as well as the instrument by which it was sought to be carried into effect, was entirely unjustifiable, and the deed in accordance with the terms of the prayer must be delivered up to be cancelled.

"It has been further asked that the sum of £75 may be treated as a part of the trust fund, and as such may be directed to be paid by H. to the trustee for the benefit of the *cestui que trust* under the will. It is a well settled principle, that if a trustee makes a profit of his trusteeship, it shall enure to the benefit of his *cestui que trusts*. Though there is some peculiarity in the case there does not seem to be any difference in principle, whether the trustee derived the profit by means of the trust property, or from the office itself. I shall, therefore, direct that the £75 be repaid by H. and dealt with as a part of the assets, and further declare the deed to be void, so that no reconveyance will be necessary." *Sugden v. Crossland*, 3 Sm. & Giff. 192.

In *Bowers v. Bowers*, 26 Penn. St. 74, it is held, that an agreement made in consideration of the plaintiff relinquishing his right to administration upon the estate of an intestate, in favor of the defendant, is against

public policy and cannot be enforced by action. This case was decided in 1856, and it is assumed in the opinion that there was at that time no case in point to serve the court, either as an authority or as an illumination. Hare, J., in the court below, said: "The question raised is one of very considerable intrinsic difficulty, increased by the absence of all conclusive or determining authority, which we have been able to find, either in the argument at the bar, or by our own researches." Woodward, J., in deciding against the validity of the agreement, says: "The question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise, and as that in its very nature endangered the purity of the trust, the law will not sanction it."

So, also, it is held, in *Whatley v. Hughes*, 58 Miss. 268, that a contract by which one agrees, for the purpose of collecting a claim against the estate of a deceased person, to administer on the estate, and thereby make the collection, and for his services retain one half of the amount collected, is immoral against public policy; and, so far as it remains executory, incapable of enforcement. Chalmers, J., saying: "It is the duty of a person receiving a claim for collection to use all lawful means to collect it. It is the duty of an administrator, by all lawful means, to defeat all claims which are not legal charges against the estate of which he is the representative. A contract, therefore, by which a person undertakes for a consideration, to assume and discharge the duties of these antagonistic positions, is illegal, and in so far as it remains executory, is incapable of enforcement."

And a contract by the guardian of C. with C.'s grandfather, to resign his position and allow the grandfather to assume it in consideration of the grandfather giving C. a child's share of his estate, cannot be enforced. *Cunningham v. Cunningham*, 18 B. Mon. 24.

An administrator having obtained his appointment by agreeing with the next of kin, not to make any charge for his services, is estopped from claiming a commission therefor. *McCaw v. Blewit*, 2 McCord's Ch. 90. See, also, *Bate v. Bate*, 11 Bush (Ky.), 689.

And an agreement whereby certain executors, defendants in a contest over the will, should renounce and allow the other executors, plaintiffs in the suit, to prove it, was held invalid and void. *Hargreaves v. Wood*, 2 Sw. & Tr. 602; *Van Meter v. Jones*, 2 Gr. Ch. 520; but see, also, *Bassett v. Miller*, 8 Md. 548; *Owings v. Owings*, 1 Harr. & Gill, 484; *Currigan's Case*, 6 Irish Jur. (N. S.) 116.

It is however held, that a contract to pay one a consideration as an inducement to him to qualify as the administrator of the estate of the obligor's father and mother is lawful, and that it may be enforced. *Clark v. Constantine*, 3 Bush (Ky.), 652; *Wheelock v. Looney*, 15 N. Y. Week. Dig. 126. See, also, *Foot v. Emerson*, 10 Vt. 338; *Spinks v. Davis*, 32 Miss. 152; *Page's Estate*, 57 Cal. 238; *Burt's Case*, 48 L. T. (N. S.) 67.

And again, where two are equally entitled to the administration, they

may lawfully agree between themselves to take out letters jointly, and that, inasmuch as one of them is to do the greater part of the work and bear the larger responsibility, the other shall receive only such nominal compensation as his associate may think he deserves. *Brown v. Stewart*, 4 Md. 368; *Astor's Estate*, 5 Whart. 228; *White v. Bullock*, 4 Abb. App. Dec. 578.

NORWOOD vs. HARNESS.

[98 Indiana, 134.]

ADMINISTRATOR'S LIABILITY.—LOSS OF DEPOSIT IN PRIVATE BANK.

An administrator is not liable for the loss of funds deposited in a private bank arising from its failure, unless the fact of the bank's weakness was known to him or could have been ascertained by the exercise of ordinary prudence and diligence.

PROCEEDINGS for final settlement of administrator's accounts.

R. Hill and *J. W. Nichol*, for appellant.

L. Ritter, *E. F. Ritter* and *B. W. Ritter*, for appellees.

BICKNELL, C. C. This is an appeal by an administrator from a judgment of said court requiring him to make a final settlement report in ten days, and to pay into court for distribution the moneys with which he was chargeable.

A citation had been issued on petition of the appellees requiring the administrator to make a final settlement, or show cause why he should not.

In his answer to that citation he stated his appointment as administrator, on the 3d day of August, 1882; that his decedent, when he died, had \$4,183 80 on deposit in the Indiana Banking Company, where he had kept his money since 1865; that said administrator was informed by Ingram Fletcher, a

banker of Indianapolis, that said Indiana Banking Company was safe and solvent, and he also learned that many leading business men of Indianapolis were making deposits in said Banking Company; that in view of these facts, and believing said company to be solvent and safe, he had said sum of \$4,188 80 transferred to his credit as such administrator, and afterwards kept it and moneys of his decedent's estate on deposit with said company; that he never knew and never heard that said company was insolvent or embarrassed, until it failed on the 10th of August, 1883; that he is a farmer living about six miles from Indianapolis, and had no safe way of keeping the money at home, and, so far as he could learn, said company was as safe as any other bank in Indianapolis; that he had on deposit with said company when it failed \$4,103 31, of which he had not been able to collect a dollar; that he has a judgment against said company for the full amount of said deposit, and has made proof in order to obtain a dividend from the receiver of said company, but has not yet received anything; that at the time of said failure he was prosecuting a suit in the Superior Court of Marion county, on a note executed by William Smock and Isaac Smock to said decedent, which was contested, and was also attempting to collect a note made by W. S. Thomas and John Thomas, and payable to him as administrator, and was trying to be ready for final settlement at the September term of said court, 1883; that no final settlement could be made before said September term, 1883, because at the close of the May term, 1883, of said court, a year had not elapsed since the date of his appointment as administrator; that on the 17th of September, 1883, he filed in this court a partial report as such administrator, showing a balance in his hands of \$4,103 31, and that all of said balance was on deposit in said Indiana Banking Company when it failed; that said claim against William Smock and Isaac Smock was compromised about January 1st, 1884, and all the debts of said estate have been paid, and that said claim against William S. Thomas and John Thomas could be adjusted, and final settlement now made, but for the fact that no part of said deposit in the Indiana Banking Company can now be collected, wherefore

he cannot make a final report ; that he is not personally liable to make good to said estate said loss by the failure of said company, but is bound to account for so much only of said money as can be collected from said banking company and its individual members. The answer concludes with a prayer that the final settlement of said estate be postponed, and that he be held accountable for so much only of said deposit as he may be able to collect.

To this answer the petitioners replied in two paragraphs :

1. A general denial.

2. That they are heirs at law of the decedent, and entitled to distribution ; that there were no debts against said estate, and no claims in favor thereof ; that long before the failure of said banking company, to wit, on May 11th, 1883, the Marion Circuit Court had settled the question as to the interests of the several heirs in the balance to be distributed, of which said administrator had notice ; that said administrator kept the funds of the estate in the Indiana Banking Company, upon an agreement to receive interest therefor, although he kept his own private account with another bank ; that before the failure of the Indiana Banking Company, more than a year had elapsed after the appointment of said administrator, who ought to have paid over and distributed all of said money before said failure, and by his negligence in failing so to do, said money was lost ; that said money was deposited by said administrator of his own motion, without order of court or consent of parties, although, at the time of said deposit, said company was, and long had been, insolvent and without capital, and that the facts as to its condition might and ought to have been known to said administrator, if he had made any effort to obtain them ; that said loss was caused by said unlawful acts and omissions of said administrator. The reply concluded with a prayer that the administrator be ordered to pay over said money to the clerk of the court, and to file his report in final settlement.

A demurrer to the second paragraph of this reply, for want of facts sufficient, was overruled. A motion for a change of venue was made by the administrator and was overruled. The

cause was submitted to the court for trial, and at the request of the administrator the court made a special finding of the facts and stated conclusions of law thereon. The following was the substance of the special finding:

1. That, on the 19th day of July, 1882, the said John Myers departed this life, in Marion county, Indiana, leaving certain heirs named in the finding, among whom are the petitioners.

2. That in a certain suit for partition the interests of all of said heirs in the balance to be distributed of the estate of said decedent was ascertained, of which said administrator had notice.

3. That, on August 3d, 1882, said administrator was appointed, and found on deposit in the Indiana Banking Company \$4,188 48 belonging to said estate, said decedent having deposited his money in that bank since 1865; that said administrator proceeded in the settlement of said estate, and that at the present time there are no debts or claims filed against the same, or known by said administrator to exist, that are unpaid; that said administrator had in the bank of said company, on August 10th, 1883, \$4,103 31 of the moneys of said estate, and is chargeable as administrator with \$4,133 86; that all the debts due said estate are collected except a judgment for \$97 against William S. Thomas and John Thomas, the stay upon which has expired, and it can be collected on call by the administrator; this finding states also the amounts to be distributed to said widow and heirs.

4. Among the assets was a note for \$1,000, made by William Smock and Isaac Smock, and payable to the decedent; that said Smocks were insolvent, and said administrator procured an order of court to compromise said claim for \$100, but afterwards, and without calling the attention of the court thereto, he brought a useless suit on said note in another court, and that he is entitled to no credit for expenses connected therewith.

5. That said banking company failed on the 10th of August, 1883, and had been insolvent for five years, and in all that time had the reputation of being an unsafe and weak bank in

Indianapolis and the surrounding neighborhood, which reputation said administrator could have known by reasonable or ordinary diligence.

6. That the decedent, John Myers, was one of the sureties of Daniel Hanway, treasurer of Marion county, on his official bond, for the period beginning September 3d, 1877, and ending September 3d, 1879; that on the 20th day of December, 1880, the auditor of Marion county brought suit on said bond in the Marion Superior Court; that said John Myers was not made a party to said suit, and said administrator was not made a party thereto until May 7th, 1884, about the time the testimony in this case was closed, and did not know such a suit had been intended until May 8th, 1884, on which day he was served with process, and that no claim against said John Myers' estate, on account of said bond, has been filed in this court.

Upon these facts the conclusions of law were as follows: That said administrator is not entitled to any credit for losses sustained by such deposit in the Indiana Banking Company, and that he has shown no reason why he should not immediately settle said estate; that said Superior Court of Marion county has no jurisdiction to enforce any claim against said estate in said suit upon said official bond; that said estate and funds, and the administration thereof, are under the control of this court, and can be reached only by a claim duly filed in this court, and that the order of the judge of said Superior Court, and the proceedings had in consequence thereof, present no excuse why said administrator should not settle the same immediately.

To these conclusions of law the administrator excepted.

A motion for a new trial made by the administrator was overruled, and a judgment was rendered requiring the administrator to pay the costs and to file in said court, within ten days, his final settlement report, and to pay into court, for distribution, the moneys with which he stands charged.

The administrator assigns errors on his appeal as follows:

1. Overruling the demurrer to the second paragraph of the reply.

2. In refusing to grant a change of venue.
3. In the conclusions of law.
4. In overruling the motion for a new trial.
5. In rendering final judgment against said appellant.

The last specification in this assignment of errors is too general to present any question. (*Clayton v. Blough*, 93 Ind. 85.) And the second specification, in reference to the refusal to grant a change of venue, presents no question, because that matter belongs to the motion for a new trial. (*McCorkle v. State*, 14 Ind. 39; *Walls v. Anderson, &c.*, *R. R. Co.* 60 Ind. 56.)

As to the first specification of the assignment of errors, we think there was no error in overruling the demurrer to the second paragraph of the reply; that paragraph averred that more than a year had elapsed since the administrator's appointment, and that all claims against and in favor of the estate had been paid, and that the administrator might and ought to have made final settlement and distribution long before the failure of the bank; that the administrator left the money in the bank for the purpose of securing four per cent. interest, and that by his negligence the money was lost.

The principal question in the case arises on the third specification of error, which is that the conclusions of law upon the facts found were erroneous, and upon the first three reasons for a new trial, which are substantially that the findings were not sustained by the evidence.

The first conclusion of law presents the question, when is a trustee liable for losses sustained by the failure of a bank having on deposit his trust money? On this subject the general rules which govern trustees are applicable to administrators. (2 Williams' Ex'rs, 1717, 1781.)

"With respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be that when the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss." (2 Williams' Ex'rs, 1545.)

In *Churchill v. Hobson* (1 P. Wms. 241) the Lord Chancellor Harcourt said: "Neither do I think the executor Churchill ought to be chargeable with the £500 by him paid to Goodwyn, he having been the cashier with whom the testator in his lifetime chose to entrust his money, and, therefore, the executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

In *Knight v. Plymouth* (3 Atk. 480), where a receiver in the country had collected rents, and, instead of sending the money to London in specie, had remitted it in bills of exchange upon London, procured from one Winsmore, which were afterwards dishonored, Lord Chancellor Hardwicke said: "It would be very hard to oblige the receiver to make good a loss which was not owing to any default of his, but as the sum was large, it was a necessary precaution to remit it by bills, rather than in specie, and, at the time the money was paid to Winsmore, he had no reason to doubt its being lodged in a safe hand."

In the case of *Belchier, Ex parte* (Ambler, 219), Lord Hardwicke said: "If trustee appoints rents to be paid to a banker * * and the banker afterwards breaks, the trustee is not answerable."

In *Rowth v. Howell* (3 Vesey, 565) the funds of a testator were in his banker's hands when he died; they were left there by his executor, and were subsequently lost by the failure of the banker. The Chancellor, Lord Loughborough, held that the executor ought not to be charged, and he said: "If he had taken them" (the securities) "to his chambers, he would have been liable to any casualty that might have happened."

In *Adams v. Claxton* (6 Vesey, 226) negotiations were pending for the appointment of another trustee, and certain moneys were temporarily deposited with one Nightingale, a banker, who stopped payment. The deed of trust contained no direction for depositing the money with a banker, yet the Master of the Rolls said: "The defendant, Claxton, is not to be charged with the money deposited in Nightingale's bank."

In *Williams on Executors* (2049-50) it is said that, even if an executor has admitted assets before suit, if a strong case be made out, he may be relieved from the admission, as if the money were in a banker's hands who failed.

In 2 *Story's Eq. Jur.* (section 1269) it is said of a trustee: "So, if he should deposit the money with a banker in good credit, to remit it to the proper place by a bill, drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible. The rule, in all cases of this sort, is, that, when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses."

In *Swinfen v. Swinfen* (29 Beav. 211) an executrix had the money of her testator's estate in a private bank which became bankrupt and the money was lost. The Master of the Rolls allowed the executrix a credit for the amount lost.

In *Johnson v. Newton* (11 Hare, 160) a testator had £3,000 in the hands of his bankers, and his executors continued the deposit; about nine months afterwards the bankers became bankrupt, and the estate lost thereby £1,000. A master had reported that "there were not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it, with the bankers." Yet the court held that the executors were not answerable for the loss, and said: "I think if the court should hold parties in that situation to be liable for losses occurring under circumstances like the present, it would become impossible to find proper persons to accept the duty."

In *Hill on Trustees*, 573, it is said: "So where the trust funds are properly deposited with a banker or agent, who fails, the trustee will be allowed the sum so lost."

In *Cornwell v. Decker* (8 Hun, 122), an administratrix having kept the money of the estate in her house, instead of depositing it in a bank, the nearest bank being twelve miles distant, the money was stolen, she was held liable, and the Supreme Court of New York said: "It is repeatedly held that if a trustee, in the exercise of his best judgment, deposits

money in a bank of good repute, he is not liable in the event of the failure of the bank. * * * Her husband had kept a bank account, of which she was aware. Although the bank was some twelve miles off, he had deemed it proper to deposit in it there, and she could and should have done the same."

In Wharton on Negligence (section 519) we find the following: "A * * trustee, * * or executor, has currency in hand belonging to his trust. Is he to keep this in his own house? This would be negligent, and would make him liable in case of loss, except under extreme circumstances of *vis major*. His duty is to deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank, at the time of deposit, is in good reputation, and if there is nothing in way of public rumor subsequently occurring which would lead a good business man to withdraw his funds."

"Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee's individual name and account; and the trustee does not become liable for a loss occasioned by a failure of the bank under these circumstances." (2 Pomeroy's Eq. Jur. § 1067. And see *McCabe v. Fowler*, 84 N. Y. 314.)

The result of the foregoing authorities is, that a trustee is not liable merely because, instead of undertaking to keep the trust money safely in his own house, he deposits it in a private bank which fails, nor because the bank is weak, unless that fact was known to the trustee, or might have been known by the exercise of ordinary prudence and diligence. The question in all such cases is, was the trustee reasonably prudent and diligent in making or continuing the deposit? If so, he will not be liable, although the bank was and had been insolvent. Such insolvency will not affect him unless he knew it, or unless it was generally known, or unless there were general rumors, injuriously affecting the credit of the bank, which were known to the trustee or might have been so known by reasonable diligence. There is a class of cases in which trustees

have been held liable for losses on investments made contrary to the directions of the instrument creating the trust, or without any authority to invest, or upon personal security merely. (*Rehden v. Wesley*, 29 Beavan, 213; *Barney v. Saunders*, 16 How. 535; *Darke v. Martyn*, 1 Beavan, 525; *Perry's Trusts*, § 465.)

But even in relation to such investments, the author last cited, in the section just referred to, says: "In States where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in particular stocks, shares of corporations, mortgages, or other securities, thus indicating his confidence in such investments, will go far to justify the trustees in continuing them."

There is a clear distinction between an investment and a deposit. In the former the trustee loses the control of the money; in the latter he retains it. His business is to keep the money safely, and banks are commonly used as safe places of deposit by prudent men. There is nothing in the decisions upon investments which impairs the force of the cases above cited as to deposits, or changes the rule to be deduced therefrom as hereinbefore set forth.

The first conclusion of law in the present case states that the administrator is not entitled to credit because of any loss sustained by the estate in consequence of its money being on deposit in the Indiana Banking Company at the time of its suspension and failure. The facts found on which this conclusion rests are:

1. That the intestate, when he died, in July, 1882, had \$4,188 48 on deposit in the Indiana Banking Company; that he had kept his money on deposit in that bank for five years, and that the administrator had in said bank, on the 10th of August, 1883, \$4,103 81, and is chargeable as administrator with \$4,133 86. These facts appear in the third special finding.

2. The fifth special finding states that said bank failed on the 10th of August, 1883, and was then, and for five years last past had been, insolvent; and that during all of said years it had the reputation of being an unsafe and weak bank in Indianap-

olis and the surrounding neighborhood, which reputation said administrator could have learned by using reasonable or ordinary diligence.

In considering an exception to conclusions of law the facts are taken to be correctly found ; the correctness of the finding can be disputed only by a motion for a new trial on the ground that the findings are not sustained by the evidence. Taking the facts as correctly found, as, for the present purpose they must be taken, there was no error in the first conclusion of law.

The second conclusion of law is, in substance, that the suit and proceedings in the Superior Court of Marion county presented no sufficient reason why said administrator should not settle said estate. It will be remembered that the administrator was appointed on the 3d of August, 1882.

The second conclusion of law rests upon the sixth special finding, which is as follows :

The decedent was one of the sureties on the bond of Samuel Hanway, as treasurer of Marion county, for the term beginning September 3d, 1877, and ending September 3d, 1879 ; that suit was brought on said bond in the Superior Court of Marion county against Hanway and some of his sureties, on December 20th, 1880 ; that the decedent, in his lifetime, was not made a party to that suit, nor was said administrator made a party thereto until May 7th, 1884, at about the time when the testimony in the present suit was closed, nor had the administrator any knowledge that any step was taken, or in contemplation, toward making him a party to said suit until May 8th, 1884, on which day the summons in said suit was served upon him, and that no claim against the estate of said decedent has been filed in the Marion Circuit Court upon said bond.

Section 2310, R. S. 1881, was amended by section 5 of the Decedents' Act of 1883, Acts 1883, p. 153, and now provides that no action shall be brought by complaint and summons against an administrator for the recovery of any claim against the decedent, but the holder thereof shall file a statement thereof in the office of the clerk of the court in

which the estate is pending, accompanied by the affidavit of the claimant, etc., and if such claim be filed after the expiration of one year after the giving of notice by the executor or administrator of his appointment, it shall be prosecuted at the costs of the claimant, and if not filed at least thirty days before final settlement of the estate, it shall be barred except as hereinafter provided in case of liabilities of heirs, devisees and legatees. The exceptions here referred to relate to the claims of creditors under disabilities and do not affect the present question. (R. S. 1881, § 2442, *et seq.*)

Heretofore it has been proper to join the administrator of a deceased joint obligor in an action against the survivors on the joint contract, but the statute just mentioned and sections 2311 to 2316, R. S. 1881, introduce new rules. Section 2311 provides that "No action shall be brought by complaint and summons against any executor or administrator and any other person or persons, or his or their legal representatives, upon any contract executed jointly, or jointly and severally, by the deceased and such other person or persons, or upon any joint judgment founded thereon; but the holder of said contract or judgment shall enforce the collection thereof against the estate of the decedent only, by filing his claim as provided in the preceding section." Section 2312 is as follows: "Every contract executed jointly by the decedent with any other person or persons, and every joint judgment founded on such contract, shall be deemed to be joint and several for the purpose contemplated in the last preceding section; and the amount due thereon shall be allowed against the estate of the decedent as if the contract were joint and several."

The other sections above mentioned, to wit, sections 2313 to 2316, R. S. 1881, regulate the extent of the liability of the estate of a decedent who was a surety or a co-surety.

Under the foregoing statutes, the pendency of the suit in the Superior Court of Marion county afforded no reason why the estate should not be settled, the year having expired, at the end of which it was the duty of the administrator to settle the estate. The decedent himself not having been a party to the suit

which was commenced in his lifetime, and no claim having been filed in the Marion Circuit Court in relation to the decedent's liability on said bond, there was no claim existing of which the Marion Circuit Court or the administrator was authorized to take notice. There was, therefore, no error in the second conclusion of law.

The next question is presented by the first three reasons for a new trial, which are substantially, that the findings were not sustained by and were contrary to the evidence.

It will not be necessary to consider any of the special findings except so much of the fifth as asserts that the Indiana Banking Company at the time of its failure, and for five years last past, "had the reputation in Indianapolis and the surrounding neighborhood of being an unsafe and weak bank, which reputation said administrator could have learned by using reasonable or ordinary diligence."

The word "reputation," used in such a connection, without limitation, implies generality, it means public opinion in the community; the "reputation of being a weak and unsafe bank" cannot exist unless there is, at least, something in the way of *public* rumor that would lead a good business man to withdraw his funds. (See the citation, *supra*, from Wharton's Neg.)

The question is, does the evidence show any such public rumor or general suspicion as to the Indiana Banking Company? The question as to whether the bank was actually insolvent is not the controlling question.

There is no pretence that such actual insolvency, if it existed; was known to the administrator, or could have been known by him in the exercise of any ordinary diligence.

He found the money in the bank; the decedent kept his money there for five years next before his death; the administrator saw men going in there depositing large sums of money, and so far as he could see everything was going on all right; about thirty other banks and bankers kept their deposits there; at the time of the failure there were from fourteen to sixteen hundred depositors there, embracing some of the leading business men of Indianapolis, one of them deposit-

ing to the amount of a million of dollars a year; only two of the ten banks then existing in Indianapolis had a larger line of deposits than this bank. It seems impossible that, under such circumstances, there could have been any public rumor or any general reputation injuriously affecting the credit of the bank. But the evidence shows conclusively that in fact there were no such public rumors and no such general reputation.

The evidence shows that the bank had become embarrassed, and perhaps really insolvent, by taking too much real estate and by the suspension of the First National Bank, and that certain persons, who had confidential means of knowledge, were aware of this, and that they understood that the bank was weak; but there is no testimony at all that at the time of the testator's death, or between that time and the failure of the bank, such matters were generally known, nor that there were any public rumors or general reputation injuriously affecting the bank's credit. On the contrary, the evidence showed conclusively that the general public opinion was that the Indiana Banking Company was a safe place of deposit, from the time the administrator was appointed until the time of its failure. The administrator, however, did not rely on this public opinion alone; within a week after his appointment, he inquired of Ingram Fletcher, a banker of Indianapolis, with whom he had kept his own bank account for many years, whether the Indiana Banking Company was good, and was told by him that it was, and to leave the money until it should be paid into court, and that he "need not lose a moment's sleep over it," and that if he, Fletcher, learned anything indicating that the Indiana Banking Company was not good, he would let him know.

Where there is testimony tending to sustain the finding, it cannot be disturbed, but here the administrator was not liable unless negligent, and there was no evidence tending to show negligence. In such a case the judgment is always reversed. (*Jeffersonville, &c., R. R. Co. v. Bowen*, 49 Ind. 154; *Jamieson v. Miller*, 54 Ind. 332; *Roe v. Cronkhite*, 55 Ind. 183; *Butterfield v. Trittippo*, 67 Ind. 338; *Davis v. Grater*, 62 Ind.

408.) The evidence did not tend to prove the existence of every fact necessary to justify the finding. (*Sharp v. McBride*, 69 Ind. 396; *Ray v. Simons*, 76 Ind. 150; *Kitch v. Schoenell*, 80 Ind. 74; *Stringer v. Northwestern M. Life Ins. Co.* 82 Ind. 100.) We think that the finding, that "for five years this bank had the reputation of being an unsafe and weak bank in Indianapolis and the surrounding neighborhood, which reputation said Norwood could have learned by ordinary or reasonable diligence," is contrary to the evidence, and that, therefore, the court erred in overruling the motion for a new trial.

This result renders it unnecessary to consider any of the other reasons alleged for a new trial, or any other of the errors assigned.

See *McCabe v. Fowler*, 2 Am. Prob. R. 126.

PHILLIPS vs. PHILLIPS.

[81 Kentucky, 328.]

COSTS OF EXECUTOR FAILING TO ESTABLISH WILL.

An executor is entitled to be paid out of the estate taxable costs and whatever reasonable sum he may have expended in addition thereto in proceedings to probate his testator's will. He is not within a statutory provision awarding costs only to successful parties.

Russell & Averitt, Welch & Saufley, Hill & Alcorn, and Wm. Lindsay, for appellant.

Rountree & Lisle, Durham & Jacobs, and C. S. Hill, for appellee.

HINES, J. This is a contest as to which of two papers is the true and last will of D. W. Phillips. The paper purporting to have been executed in 1869 gives the property to the nomi-

nated executor, J. G. Phillips, in trust for the son of D. M. Phillips, and in case of his death, to certain charitable uses. The other paper, executed after the death of the testator's son, in 1877, gives the estate to B. H. Ray and Ben. Doom, nephews of the testator, and nearest of kin, to whom the estate would have passed in case of intestacy. The J. G. Phillips, the nominated executor in the will of 1869, offered it for probate, when he was met by appellees with the claim that the will of 1877, which, in terms, revokes all other wills, was the last and true will of D. W. Phillips. The will of 1877 was admitted to probate, whereupon appellant, J. G. Phillips, as nominated executor, appealed to the Common Pleas Court, where the question as to which of the two papers, if either, was the will of D. W. Phillips, was submitted to a jury, and a finding had in favor of the will of 1877. From that finding this appeal is taken.

The issue below was, whether the testator was of sound mind, and whether the will of 1877 was obtained by undue influence.

The record contains some two thousand pages, with much conflicting evidence ; but after a careful reading and consideration of it, we arrive at the conclusion that the weight of the evidence is in favor of the sanity of the testator at the time of the execution of the will of 1877, and that no undue influence operated to secure its execution ; but if we were not satisfied of this, we could not disturb the verdict of the jury unless the weight of the evidence was flagrantly against the finding of the jury, as verdicts in will cases are to be treated in this court as verdicts in other cases.

The one hundred and sixty-nine assignments of errors in this case may be condensed and stated, in substance, as follows :

First. That the court should not have submitted the issue on each of these wills to the same jury, as it is claimed the field of testimony necessary to go over on these two issues was so great as to create confusion in the minds of the jury.

Second. That it was error to allow the devisees, B. H. Ray and Ben. Doom, to testify.

Third. That the court erred in various instances in the admission and rejection of evidence.

Fourth. Errors in giving and refusing instructions.

Fifth. In giving personal judgment against appellant, J. G. Phillips, for cost.

As to the first assignment, we think the court below pursued an eminently wise and proper course in submitting the issue of will or no will, as to each of these papers, to the same jury, and acted properly in the method of introducing testimony to sustain or overthrow.

The second objection, that the devisees, Ray and Doom, were permitted to testify, has been repeatedly decided in favor of their competency. (*Milton v. Hunter* and *Cave v. Cave*, 13 Bush, 163 and 453; *Flood v. Pragroff*, 79 Ky. 614.)

The third point covers the admission and rejection of evidence in a great number of instances. We have examined them all, and while, in several cases, we find technical errors both in the admission and rejection of evidence, there is nothing to materially injure or prejudice appellants, and we will therefore not discuss them in detail, as it would be a useless consumption of time.

The principal complaint on the fourth point is, that the court did not correctly define to the jury that soundness of mind necessary to the valid making and execution of a will. The court defined it as follows:

"That soundness of mind in making a will is capacity to know by the testator his legal heirs, and his estate, and to dispose of the same in a rational manner, according to a fixed purpose of his own."

This is the same instruction, in substance, that was given and approved in *Tudor v. Tudor* (17 B. M. 391), and which has been so long and so repeatedly indorsed by this court, that we are not inclined to disturb it, although it be possible to get an instruction with more technical accuracy. It is not calculated to mislead the jury, and that is reason enough for allowing it to remain as it is. (*Wise v. Foote*, Op. Feb. 5, 1883, 4 Law Rep. 645.)

The instructions given by the court as to insane delu-

sions and undue influence accord with our view of the law and with the repeated rulings of this court. An attempt at a fuller and more accurate definition of any of these words would more probably mislead and confuse the average juror than enlighten him.

Many of the instructions asked for by appellants and refused were in reference to the weight to be given certain portions of the evidence, and as to the presumptions to flow from given relations between the parties and the testator. Many of them are, abstractly, good law, and would be applicable if the court were to determine the facts as well as the law; but they are not applicable under our system, where the law is for the court and the facts for the jury. In such cases undue prominence should not be given in the instructions to any fact or circumstance proven in the case. When the evidence is determined by the court to be competent, it goes to the jury for them to weigh.

The question presented by the fifth point requires more elaborate treatment than any of the others.

If the provisions of the General Statutes in regard to cost generally apply to the cost of a nominated executor who fails, when acting in good faith and upon reasonable grounds, to secure the probate of the will in which he is named as executor, then the judgment of the court below adjudging against him personally the costs is correct, otherwise not. That the provisions in reference to costs apply generally to civil and equitable actions, and not to a case like this, we think is clear.

Section 12 of chapter 26, General Statutes, provides that "the party succeeding in any civil action, on the merits or otherwise, shall recover costs, unless differently provided in this chapter."

The 13th section makes provision for taxation of costs in equity actions. The 17th section is as follows:

"A personal representative, plaintiff or defendant in any action, shall, if unsuccessful, be adjudged to pay costs as other litigants. The judgment for costs in such cases shall

only be against the assets which have or may come to his hands."

Nowhere in this chapter are nominated executors referred to, unless this last quoted section refers to them; but that it does not is clear from section 1, article 1, chapter 39, which is as follows:

"The person named in a will as executor of it shall not act as such to any extent until the will, or an authenticated copy of it, is admitted to record, and he has executed bond and taken the oath required by law in the court in which the record is made; but he may provide for the burial of the testator, pay the reasonable funeral expenses, and take care of and preserve the estate."

So it is seen that, within the meaning of the provisions of the statute as to costs, he cannot bring an action, and therefore they make no provisions for the costs of a nominated executor on failure to have the will probated, although the statute makes it his duty to offer the will for probate, and, as we have held, that it is his duty to prosecute an appeal from the judgment of the County Court rejecting the will, if he believes the judgment wrong. (*Pryor v. Mizner*, 79 Ky. 232.)

It being his duty to offer the will for probate, and, in good faith, to exhaust all legal or equitable remedies to that end, and the statute making no provision for cost, it is reasonable to conclude, as we have adjudged, and as appears to be the general rule, he should be compensated out of the estate for the discharge of this duty. (*Gilbert v. Bartlett*, 9 Bush, 52; *Redfield on Wills* [3d ed.], vol. III, side page 123; 31 Penn. St. 311; *Ammais' Appeal*, 1 Houston, 458, *Browne v. Davis, ex'r.*)

The question then is as to the manner in which relief should be granted. If the judgment of the lower court is affirmed, the question of the right to the cost would be *res adjudicata*. If it is reversed and sent back, in what manner shall be determined the amount to which appellant is entitled? If he is relegated to an action in equity, a re-examination of the whole of the large record we have been considering would be necessary to a correct conclusion as to whether the proceedings by appellant were in good faith, as well as to determine the amount

to which he is entitled. The court from which this appeal comes being one of general jurisdiction, and the question of cost being a mere incident to the main proceeding, there appears no reason why that court may not appoint a commissioner to take proof and report such incidental expenses as reasonable counsel fees, and whatever reasonable sums appellant may, in addition to the taxable costs, have expended in the effort to probate the paper of 1869, and on that report adjudge that it be paid out of the estate, appellant first accounting for anything belonging to the estate that may be in his hands. There appears here no evidence of bad faith on the part of the nominated executor, and as this case must be reversed for failure to allow appellant, J. G. Phillips, his costs as nominated executor, we necessarily determine that there was no fraud or misconduct on the part of J. G. Phillips, acting as nominated executor.

As all the parties interested in the estate were before the court, and had full opportunity to be heard, the court erred in refusing to sustain appellant's, J. G. Phillips, motion to allow him his costs.

Wherefore, the judgment against J. G. Phillips for costs is reversed, the judgment in other respects is affirmed, and the cause remanded, with directions to appoint a commissioner as and for the purpose indicated, and for further proceedings consistent with this opinion.

That an executor will not be allowed out of the estate the costs of proceedings taken by him to establish a forged will. *Sheetz's Appeal*, 3 Am. Prob. R. 198.

RIVENETT vs. RIVENETT.

[53 Michigan, 10.]

DEVISE TO "SURVIVORS OR THEIR LEGAL REPRESENTATIVES."

Under a devise to testatrix's children by name "in equal proportions," and in the event of either dying before the other, his or her share to be "divided among the survivors or their legal representatives share and share alike," the two children of a daughter so dying take only their mother's share.

PROCEEDINGS to construe a will.

Alex. T. Hurst, and *F. A. Baker*, for appellants.

James H. Pound, for appellees.

SHERWOOD, J. On the 15th day of July, 1858, Victorie Rivenett made her last will. She then had four children, two daughters and two sons, neither of whom were married.

After giving her wearing apparel and certain other personal property particularly specified to her daughters, in equal shares, she then bequeathed her real estate and all her other personal property to her four children, by name, "in equal proportions to each, share and share alike;" and then added the following clause: "And in the event of either of my said sons or daughters dying before my death, then and in that case my said estate shall be divided among the survivors, or their legal representatives, share and share alike."

The daughter Emma married Frederick Bourquin in 1860, and died in 1873, leaving two children, George and Emma Bourquin, as her only heirs at law. The testatrix died on the 6th day of December, 1881. The main question under the will is, are Mrs. Bourquin's two children entitled, under the will of their grandmother, to the share their mother would have taken had she survived the testatrix?

The judge of probate for the county of Wayne decided that the two grandchildren were entitled under the will to the share bequeathed to their mother; and on appeal to the

Circuit Court for the county of Wayne the decision of the Probate Court was affirmed. The case now comes before us on special findings of fact and of law by the circuit judge. How. Stat. § 5812, reads as follows :

“ When a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done, if he had survived the testator ; unless a different disposition shall be made or directed by the will.”

Under this section the intention of the law-making power is unmistakable. It is very clear that not only are lapsed legacies avoided in the cases mentioned in the statute, but its provisions necessarily settle the question made in this case in favor of the children of Mrs. Bourquin, unless by the clear and unequivocal language of the will a different interpretation is made to appear. If there is any reasonable doubt about the question, the statutory construction must prevail, and the judgments of the two courts already given should be sustained.

A large number of authorities might be here collated on either side of the question presented, but a review of the conflicting opinions would rather tend to confuse than elucidate the proper solution of the question, and could serve no useful purpose. The natural feeling of the testatrix towards her grandchildren, as shown by the testimony, pretty well indicates what should be the proper construction of the clause of the will we are now considering. When important rights are created by the use of language conveying the intention of the parties, under the ordinary and commonly-accepted meaning of the same among persons not acquainted with its technical legal signification, that meaning should be applied in construing the instrument under which such rights are created. To do otherwise would be not to apply, but to pervert the law.

By the term “ legal representatives ” in this will was evidently meant the lawful heirs ; a different construction is not claimed by either party. It is only in case of the death of one

of the four children of the testatrix that she desired any of the property to go to "legal representatives" of any of her children. If the "legal representatives" intended are confined to those of the survivors, as claimed by counsel for appellant, then the term has no meaning in the will, because survivors could have no *legal representatives*. A will must be so construed that each word means something, if possible, and this cannot be done unless the words "legal representatives" mean the legal heirs of Emma Bourquin, which will entitle her children to their mother's share (had she lived) in the estate of the testatrix; and this, I think, is the true construction of the will.

The following are some of the cases and authorities which may be consulted with interest upon the questions involved, as they are not free from doubt: 2 Redf. Wills, 44, 45, 78, 79; *Johnson v. Johnson*, 3 Hare, 157; 1 Jarm. Wills, 328; *Branson v. Hill*, 31 Md. 190; *Moore v. Lyons*, 25 Wend. 119; *Bridge v. Abbot*, 3 Br. Ch. Cas. 224; *Smith v. Palmer*, 7 Hare, 225; *King v. Cleaveland*, 26 Beav. 26; *Holloway v. Radcliffe*, 23 Beav. 163; *King v. Cleaveland*, 4 DeGex & J. 477; *Winter v. Winter*, 5 Hare, 306; *Edwards v. Symons*, 6 Taunt. 213; *Garey v. Whittingham*, 5 Beav. 268; *Locker v. Bradley*, 5 Beav. 593; *Stopford v. Chaworth*, 8 Beav. 331; *Salisbury v. Petty*, 3 Hare, 93; *Jarvis v. Pond*, 9 Sim. 549; *Coulthurst v. Carter*, 15 Beav. 421; *Ive v. King*, 16 Beav. 54; *Baines v. Ottey*, 1 Mylne & K. 464; *Gray v. Garman*, 2 Hare, 268; *Smith v. Smith*, 8 Sim. 353; *Harrison v. Foreman*, 5 Ves. 207; *Cotton v. Cotton*, 2 Beav. 67; *Bond's Appeal*, 31 Conn. 183; *Ram on Wills*, 96; *Gittings v. M'Dermott*, 2 Mylne & K. 69; *Doe v. Wilkinson*, 2 Term, 209; *Doe v. Dring*, 2 M. & S. 448; 2 Jarm. Wills, 742; *Bender v. Dietrick*, 7 W. & S. 284; *Howard v. Amer. Peace Society*, 49 Me. 288; *Areson v. Areson*, 3 Den. 458; *Minter's Appeal*, 40 Penn. St. 111; *Lessee of Hauer v. Sheetz*, 2 Binn. 532; *Russell v. Long*, 4 Ves. Jr. 551; *Rosbuck v. Dean*, 2 Ves. Jr. 265; *Fisher v. Hill*, 7 Mass. 86; *Ballard v. Ballard*, 18 Pick. 41; *Hooper v. Hooper*, 9 Cush. 122; *Moore v. Weaver*, 16 Gray, 305; *Esty v. Clark*, 101 Mass. 36; *Wimple v. Fonda*, 2 Johns. 288.

The views here expressed are not in conflict with the de-

cisions of this court heretofore made. (*Eberts v. Eberts*, 42 Mich. 404; *Rood v. Hovey*, 50 Mich. 395; *Porter v. Porter*, 50 Mich. 456; *Ireland v. Parmenter*, 48 Mich. 631; *Toms v. Williams*, 41 Mich. 564; *Conrad v. Long*, 33 Mich. 80.)

The law favors that construction of a will which will make a distribution as nearly conformed to the general rule of inheritance as the language will permit; and favors equities rather than technicalities. (*Letchworth's Appeal*, 30 Penn. St. 175; *Johnson v. Ballou*, 28 Mich. 392.)

The findings in the case of what Mrs. Rivenett said after her daughter Emma died, as to the interest of the latter's children in her estate under the will, was supported by the evidence, which I think was admissible, and fully confirms the construction herein given to the clause in controversy. It is, however, upon the language of the will itself that the conclusion herein expressed is reached.

On the strength of certain conveyances an objection is raised on the part of appellees that appellants have no interest in the subject-matter of this litigation sufficient to enable them to appeal. It is not shown that they have conveyed away their interest in the personal estate of the testatrix. The objection on this point is not well taken.

I think the judgment of the Circuit Court affirming that of the Probate Court fully sustained by the findings, and should be affirmed, with costs of both courts.

COOLEY, C. J., and CHAMPLIN, J., concurred.

See *Burnet v. Burnet*, 1 Am. Prob. R. 589.

BIRMINGHAM vs. LESAN.

[76 Maine, 482.]

LIFE ESTATE.—POWER OF DISPOSAL.

A devise to testator's widow "to hold the same during her life for her maintenance, but not to sell the same, the said real estate to go to J. M. at her death, if any remains," vest a life-estate in the widow, without any power of disposal.

BILL to redeem foreclosed property.

Barker, Vose and Barker, for plaintiffs.

Charles P. Stetson, for defendant.

FOSTER, J. The determination of the question raised by the demurrer in this case depends upon the construction to be given to the will of James McDermott.

The language used is not wholly free from ambiguity. The second clause in the will is the only one concerning which any doubt can arise as to the intention of the testator, and it reads thus: "I give and devise to my wife Catherine, all the real estate that I may die seized of, to hold the same during her life for her maintenance, but not to sell the same, the said real estate to go to John Mehan at her death, if any remains, providing the said Mehan maintains and provides for the said Catherine, decently, from the proceeds of the farm or otherwise; and providing the said Mehan fails to provide for the said Catherine, then the said Catherine is empowered to call on the selectmen to provide for her in her own house."

By the well settled rules of construction, as well as by the authorities, the devisee, Catherine McDermott, took a life-estate in the property devised by express words of limitation, and not by implication. (*Stuart v. Walker*, 72 Me. 152; *Leighton v. Leighton*, 58 Me. 63.)

The question then which is naturally presented by this case is, whether the widow of the testator took this estate with the power of disposal annexed to her life-estate.

In considering this proposition we resort, in the first instance, to the application of those elementary rules of construction, which provide that the intention of the testator is to have a controlling influence in the interpretation of the language used in his will, provided it be consistent with the rules of law ; and that this intention is to be collected from the whole will taken together. (*Shaw v. Hussey*, 41 Me. 497.)

The words of the devise are plain and distinct in the creation of a life-estate by express limitation : " I give and devise to my wife Catherine, all the real estate that I may die seized of, to hold the same during her life for her maintenance, but not to sell the same," &c. Any other construction would do violence to the intention of the testator as expressed in apt and explicit words of limitation, expressive of that intention. (*Stuart v. Walker*, *supra*, 154 ; *Warren v. Webb*, 68 Me. 135.)

In the same clause in which the life-estate is set out to the devisee to be held during her life for her maintenance, there appear these words restrictive of the power of alienation, " but not to sell the same," and which, taken in connection with the language preceding, seem clearly to indicate the intention of the testator to limit the estate for life, with no power of disposal of the fee annexed.

No doubts would linger in the mind as to what was the manifest intention of the testator, were it not for the expression, " if any remains," which immediately follows in the same sentence when providing for the disposition of the estate at the death of his widow.

These words, by implication, are in opposition to the language of the testator in the same clause by which the devisee for life is prohibited from making sale of the real estate, and, apparently, inconsistent with every other expression in the will.

Now, taking the whole will together, from which to ascertain the intention of the testator, it will be seen that the real estate was to go to Mehan at the death of the widow, provided he should maintain and provide for her from the proceeds of the farm or otherwise, and if he should fail so to provide for her, then she was empowered to call on the selectmen to pro-

vide for her in her own house; or if Mehan should provide for her during her life, but neglect to put a headstone at her grave, then the selectmen might do so from the proceeds of the estate.

Here, certainly, from this language can be gathered no intention that the widow was empowered to sell the estate, but rather, on the contrary, that she was to be supported from the "proceeds" of the farm, and that, by a further provision in the will, while she had a right to occupy one-half of the lower part of the house during her natural life, the other half was to be used by said Mehan. Furthermore, by the fourth item the testator expressly declares that said Mehan is to be allowed the use of the place for the purpose of maintaining himself and the widow of the testator by farming the same.

If the power of sale were to be implied from the use of the words, "if any remains," in the connection in which they stand, it would be not only in direct conflict with the previous language of the testator, in which he expressly denies the power of alienation to the devisee of the estate for life, but inconsistent with the right of the remainderman, whose right of occupancy during the life-time of the widow was expressly provided for by the terms of the will, as well as depriving the selectmen of using the proceeds of the estate for furnishing a headstone at her grave, and providing for her at her own house, in case the said Mehan should fail to provide for her.

We do not intend to hold that these words may not oftentimes imply a power to convey, in connection with the devise of a remainder of real estate after an estate for life; but upon an examination of the authorities we have been unable to find any case where, standing in connection with a life-estate by express limitation with a devise over, they have been construed as giving a power of disposal of the fee, unless they were in harmony with the spirit of the other parts of the will. Certainly not, when the power that might otherwise be implied by them is not only in conflict with the express language of the testator, but contrary to his manifest or apparent intent as collected from all the provisions of the will. (*Leighton v. Leighton*, 58 Me.

69, 70; *Warren v. Webb*, 68 Me. 135, 136; *Paine v. Barnes*, 100 Mass. 471; *Taggart v. Murray*, 53 N. Y. 236.)

It will be noticed that in many of the cases where such words as, "if any remains," "if any shall remain unexpended," and other similar expressions, are held to imply the right of disposal, the testator had, either expressly or impliedly, authorized the disposal of his estate by the use of other language, and with which these expressions were only in harmony in conveying the intent of the testator. (*Ramsdell v. Ramsdell*, 21 Me. 288; *Harris v. Knapp*, 21 Pick. 416; *Leighton v. Leighton*, 58 Me. 69; *Scott v. Perkins*, 28 Me. 35; *Burleigh v. Clough*, 52 N. H. 267.) And our court, in referring to the case of *Harris v. Knapp* (*supra*), says: "The court gave great force and effect to the phrase, 'whatever shall remain at her death,' deducing from it the conclusive implication that the devisee had the right to dispose of the property. The use of the word 'disposal' in the will, however, undoubtedly contributed to the conclusion arrived at by the court." (*Warren v. Webb*, *supra*.)

From a careful examination of the provisions of this will, we are satisfied that it was the intention of the testator that his widow should take a life-estate with no power of conveying the fee; that the words, "if any remains," taken in the connection in which they are found, must yield to the more positive and unequivocal declaration of the testator, "but not to sell the same," and which is in harmony with the other provisions of the will.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

Construction of the words "What remains," "whatever may remain," "if anything remains," etc., etc.—In *Harris v. Knapp*, 21 Pick. 412, it appears that a testatrix, after directing a sale of all her real estate and the payment of her debts, added "*What remains* of real and personal estate I give and bequeath as follows: one-half thereof to my daughter, M., for her use and disposal during her life, and *whatever shall remain* at her death I give the same to her two

daughters, D. and G., in equal shares, and the other half to the children of my son." It was held that this was not a bequest to M. merely of the income of one-half of such residuary fund during her life, but that she might in her life-time, if not alone at least in conjunction with her husband, dispose of the principal, either wholly or in part. Chief-Justice Shaw in the opinion, says: "The respondent contends that this bequest is neither an absolute one, nor does it confer a power of appointment and disposal upon the wife in her life-time, but that it is a gift of the income only to the wife during her life, with a gift of the whole of the principal to her two daughters after her decease, and that the executor is constituted a trustee to hold the fund, to meet and accomplish these purposes of the will. This is the question which has been discussed and considered. The Court are of opinion that the construction contended for by the respondent is not the true and correct construction of the will. Such a construction would render several of its clauses nugatory and without force or effect. The words 'what shall remain,' in the clause of the will cited, have different meanings in the two instances in which they are used. In the first they embrace all her personal estate, including the proceeds of the real, after the payment of debts and specific legacies. One-half of this property she gives to her daughter, M., then and still a married woman, for her use and disposal during her life, and whatever shall remain at her death she gives the same to her two granddaughters. In this last case the words 'whatever shall remain' necessarily mean that portion of the property bequeathed, which shall be undisposed of at her decease, but there is no allusion in the will to any mode by which the sum thus given is to be diminished, except the disposition thereof to be made by Mrs. H., and therefore the implication is inevitable that she had a power to make such disposition. This is inconsistent with the supposition that the whole was to remain undiminished in the hands of the executor, or other trustee, for the purpose of satisfying the gift over. Again, upon the supposition that this was a gift of the interest only to the wife, without power of any sort over the principal, the words 'for her use and disposal,' applying as they do to the principal sum itself, would be wholly nugatory. So far from being nugatory, we think they indicate an intent on the part of the testatrix that her daughter, who was one principal object of her bounty, should either have this property to her own use, with a contingent gift to the grandchildren, in case it should specifically remain at her decease, or that the daughter should have a power of appointment and disposal of the principal in the hands of the executor or trustee, with a like contingent gift to the grandchildren, and that it was not the intent of the testatrix to place the whole capital in the hands of the executor, in trust to invest it, and pay the income only to the daughter during her life, and then the whole principal to the grandchildren."

In *Hale v. Marsh*, 100 Mass. 468, Foster, J., says: "The will of Enoch Hale, subject to a charge for the payment of his debts, gives, devises, and bequeaths to his wife Jane, all his property and estate, both real and personal, 'freely to be possessed, used and enjoyed by her, for and during the period of her natural life; with full and absolute power and authority to sell and dispose of the whole or any part or portion of the same, whether real or personal, at her own pleasure, and to manage, use and improve the same according to her discretion.' Then follows a provision that in case the income and rents of said property and estate 'shall not be sufficient to provide for the complete maintenance of my said wife, and to enable her to make such further and other expenditures as she may deem it expedient or desirable to make, then and in such case I give to my said wife full and absolute power and authority to expend so much and such parts of the principal as she may elect, and for such uses and purposes as she may deem expedient or desirable.' Then the testator proceeds to give his wife a full power to dispose by will of the whole of his property and estate, or of so much thereof as may remain unexpended at her decease. Then a devise over is made to certain relatives of the testator, to take effect 'if my said wife shall happen to die before me, or if any of my said property and estate shall remain unexpended by her at the time of her decease, and not disposed of by any last will or testament to be made by her after my decease.' The question is whether this testator's widow may convey in fee simple a portion of his real estate. The Court entertain no doubt of her power to do so. The gift is of a life-estate, with a full power of disposition, both by deed and will, over the entire property, at the pleasure of the devisee, without limitation or restriction, as to the time, mode or purposes of the execution of the power. In such a case the authorities seem to hold that the life-estate and unlimited power of disposition over the remainder coalesce and form an estate in fee, and that the devise over of what may remain is void, because inconsistent with the unlimited power of disposition given to the first taker."

In *Paine v. Barnes*, 100 Mass. 470, it was held that where a testator gave his wife all his real and personal estate "for her support and benefit during her natural life," and after his wife's death, "if anything of said estate should remain," gave it over to designated third persons, that the wife took only a life-estate with a power of disposal upon a contingency, Hoar, J., said: "The Court are of opinion that the language of the devise to the wife can only be construed as giving her an estate for life with a contingent power of disposition of the remainder only in case of its being needed for her support. The fact that there is a remainder devised over after the estate for life to her, shows that it could not be intended to give her a fee, and that the purpose for which the estate is given can only at the most imply a power of disposal if the exigency should arise. Per-

haps, upon the authorities, the use of the phrase 'if anything should remain,' in connection with the devise of a remainder of real estate after an estate for life, would imply a power to convey, as otherwise there could be no reason for the doubt whether the estate would remain."

It is well intimated in the leading case that the use of such words or phrases as "if anything remains," or "whatever may remain," and kindred expressions, will be held to give a power to convey the estate only when, from other parts of the will, it may be gathered that the testator intended to authorize the disposal of his estate, but that such words and phrases, alone and in and of themselves, ought not, in general, to be held to imply the right in the first taker to dispose absolutely of the property. Whether the testator intended to give the fee, or a life-estate, must appear from other expressions in the will, or from the instrument as a whole, and the better authority seems to be in favor of the rule that these conditional expressions should not generally govern in the determination of that question.

See *Foot v. Saunders*, 72 Mo. 616; s. c. 2 Am. Prob. R. 73, and many cases collected in the note. See *Stuart v. Walker*, 3 Am. Prob. R. 79; *Brown v. Merrill*, *Ibid.* 148.

FITE vs. BEASLEY.

[12 B. J. Lea, 328.]

BEQUEST TO ERECT AND KEEP IN REPAIR MONUMENT.—PERPETUITY.

A direction to executors to apply a specified portion of a bequest to enclosing and cleaning up a family graveyard and erecting a monument, is valid, but a gift of the residue in trust to keep in repair the fence and monument is void, as tending to a perpetuity.

ACTION to construe a will.

J. A. Fite, for complainant.

J. J. Turner, for defendants.

COOPER, J. W. H. Beasley died in May, 1880, without wife or child. He left a will of which J. A. Fite is executor, and

for a construction of which this agreed case was made. The questions presented are whether any part of the bequest in the second item of the will is void, and if so, what becomes of the money intended to be bequeathed by the void clause.

"I," says the testator, "being desirous of making a disposition of such property and effects as I possess, do make and publish this my last will and testament." Then follows item: "First. I direct that as soon after my death as possible my executor, to be hereafter appointed, shall, out of any money that I may die possessed of, or that may first come into his hands, pay my funeral expenses, and any debts I may owe."

In the second item of his will the testator expresses an earnest desire to have enclosed and taken care of his father's family graveyard, where, he says, "my father and mother and wife are buried," and "where I desire to be buried," and to have erected over his parents' graves a suitable monument. For this purpose he sets apart out of his estate the sum of five thousand dollars to purchase and place over the graves of his parents a marble monument to cost \$500, and to have the ground enclosed with an iron fence of a particular description. Then follows this clause: "I further direct that whatever sum of said five thousand dollars shall be left after paying for the aforesaid monument, fence and clearing of said graveyard, shall be loaned out by my executor upon good security, and the interest arising from the same shall be used in keeping said graveyard and fence, and the monument there, in good repair; and upon the death or resignation of my executor, I request that the county court shall appoint a trustee to take charge of said fund, who shall use the same as above directed."

A number of specific legacies in property and money are then set out in the will in separate items. In the 21st item he directs his executor to sell all his real estate "not herein disposed of" at public vendue. Then follows item:

"Twenty-second. It is my will and desire that all the balance of my property, after paying the above special bequests and the five thousand dollars disposed of under the second clause of this will, be divided into four equal parts, and I give

the same as follows: One-fourth to my brother, Major A. Beasley; one-fourth to the children of my brother Gabriel D. Beasley, and to the representatives of such as may be dead leaving children; one-fourth to Eliza Grizzard, and the other fourth to Joanna Beasley."

At common law, funeral expenses, according to the degree and quality of the deceased, were allowed of the goods of the estate before any debt or duty whatsoever. (3 Inst. 202.) And such priority, next after certain expenses of administration, is recognized in this State by statute. (Code, sec. 2350; *Stephenson v. Stephenson*, 3 Hayw. 123.) A headstone, tombstone, or other suitable memorial, is held to be a proper part of such expense. (*McGlinsey's Appeal*, 14 S. & R. 64; *Fairman's Appeal*, 30 Conn. 205; *Killebrew v. Murphy*, 3 Heis. 546, 558.) A direction to executors by will to erect a monument at the testator's own grave is not a legacy, but is to be considered as a part of the decedent's funeral expenses. (*Wood v. Vandenburg*, 6 Paige, 277.) A bequest by will in trust to erect a monument to the memory of the testator, or of his mother, father, or other near relative, would be good. (*Adnam v. Cole*, 6 Beav. 353; *Masters v. Masters*, 1 P. W. 423.) For there is nothing to control the general right incident to property of disposing of it for a lawful purpose, to be used in a reasonable time after the testator's death. (*Mellick v. The Asylum*, Jac. 180.) But a bequest or direction for keeping a tomb in repair is not a charitable use. (*Lloyd v. Lloyd*, 2 Sim. N. S. 255.) And therefore a bequest of money, the interest of which is to be applied in keeping up the tombs of the testator and his family, is void as a perpetuity. (*Pickard v. Robson*, 31 Beav. 244; *Hoare v. Osborne*, L. R. 1 Eq. 385; *In re Burkitt*, 9 Ch. D. 576; *Piper v. Moulton*, 72 Me. 155; *Hornberger v. Hornberger*, 12 Heis. 635.) For the trustee cannot dispose of the fund otherwise than in accord with the trust, and there are no living *cestui que trusts* to act. (*Franklin v. Armfield*, 2 Sneed, 306, 354.) The estate is inalienable in *sæcula sæculorum*, both for that reason and because such is the plain intent of the testator in such cases. (*Thompson v. Shakespeare*, 1 DeG. F. & J. 399; *Carpe v. Long*, 2 DeG. F.

& J. 75; *Washburne v. Downes*, 1 Ch. Cases, 213.) The bequest in the second item of the will of the testator now before us is, therefore, void as to the surplus of the \$5,000, after paying for the monument, fence, and clearing up the graveyard. And the remaining question is, what becomes of this surplus?

A general residuary devise or bequest would carry to the legatee not only the personal estate which the testator does not attempt to dispose of by his will, but also such personalty as had not effectually been disposed of, in which class would fall money bequeathed for a purpose void in law. (*Reeves v. Reeves*, 5 Lea, 655.) And the mere enumeration of certain particular property in connection with the general words of disposition will not necessarily limit the comprehensive import of the general words. (*Williams v. Williams*, 10 Yer. 20; *Jarnagin v. Conway*, 2 Hum. 50; *Edmondson v. Edmondson*, 1 Tenn. Ch. 563.) It is otherwise, however, if in the residuary clause there is an enumeration of all the property intended to be given. (*Perry v. High*, 3 Head, 350.) Or if the will plainly discloses a different intent. (1 Jar. Wills, 762.) The question is one of the intent of the testator in view of the whole will, and the language of the residuary clause.

"A residuary bequest of personal estate," says Sir William Grant, "carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of; not in consequence of any direct or expressed intention, for it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him; no, for he does not contemplate the case; the residuary legatee is to take only what is left, but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee." (*Cambridge v. Rous*, 8 Ves. 12, 25.) And, therefore, says Lord Eldon, "very special words are required to take a bequest of the residue

out of the general rule." (*Bland v. Lamb*, 2 J. & W. 399, 406.) The presumption is that the testator did not intend to die intestate as to any portion of his property when he undertook to make a complete will, and excepts the special legacy out of the residuum only for the benefit of the legatee. The law, consequently, requires the use of words clearly limiting the gift of the residue, and showing, in express terms, an intention to exclude such portions of his estate as may fail to pass under previous clauses of the will, in order to take it out of the general rule above stated. (*King v. Woodhull*, 3 Edw. 79.) The principle on which the court acts is plain enough, the only difficulty being in its application to particular cases. (*Peay v. Barber*, 1 Hill's Ch. 95.)

The residuary devise in the will before us is of "all the balance of my property after paying the above special bequests and the five thousand dollars disposed of under the second clause of this will." But is that anything more than saying all the residue of my estate after complying with the previous provisions of the will, those provisions being repeated? That was the form of the residuary clause, held to pass a lapsed legacy specified therein, in *King v. Woodhull*, 3 Edw. 79. There, after a bequest to the American Home Missionary Society not exceeding \$1,000, the devise was of "the residue and remainder of my estate after the payment of the said one thousand dollars to the said Missionary Society." The legacy to the society failed, and was held to pass to the residuary devisee. "All the balance of my property" would be equivalent to the "rest and residue of my property," which is a common form. (*Cambridge v. Rous*, 8 Ves. 12; *Shanley v. Baker*, 4 Ves. 732.) Such language implies the giving of what remains after satisfying previous legacies. But the expression of what is thus implied cannot affect the legal result, and so it has been repeatedly held. In *Roberts v. Cooke* (16 Ves. 451) the devise was of all the rest and residue of the real and personal estate "not hereinbefore specifically disposed of." In *Bernard v. Minshull* (Johns. Ch. [Eng.], 276) the words were "all and singular other my property and estate." In both cases the residuary clause carried lapsed legacies. So, a gift of all a

testator's personal estate "except" certain specified sums of stock and money, followed by a bequest of those particulars excepted, was held to include some of the specific legacies which had failed. (*Evans v. Jones*, 2 Coll. C. C. 516.) So, where the bequest was of "everything real and personal except the S. shares," the shares were held to pass. (*James v. Irving*, 10 Beav. 276.)

The language used in the clause before us brings the case within the general rule, and there is nothing in the rest of the will to show a different intent from that implied by law.

The chancellor's decree must be reversed, and a decree entered here accordingly. The costs will be paid by the executor out of the assets of the estate.

See *Piper v. Moulton*, 2 Am. Prob. R. 574, and cases in note on page 586, and *Bates v. Bates*, 3 Id. 212.

CUMMINGS vs. PLUMMER.

[94 Indiana, 408.]

"CHILDREN."—"GRANDCHILDREN."

A distribution directed in favor of "my children living, and the children of my deceased children," will not include testator's great-grandchildren.

ACTION to construe a will.

Brown & Brown, for appellants.

T. D. Evans, for appellees.

COLERICK, C. The appellants filed their complaint against the appellees to obtain a construction by the court of certain

provisions in the will of Henry Peinson, deceased. A demurrer to the complaint, assigning insufficiency of facts, was sustained, and, the appellants declining to amend, final judgment, on demurrer, was rendered against them, from which they appeal. The only error assigned is the ruling of the court upon said demurrer.

The provisions of the will to be construed are embraced in the second item or article thereof, as follows :

"Article 2d. I direct my executor to sell my homestead farm on which I now reside, in Harrison township, Union county, Indiana, consisting of two hundred and ten acres, also my farm in Center township, county above written, on which my son Isaac now resides, to best advantage as he may consider, and when my estate is changed into money I desire my executor to make distribution between my children living, and the children of my deceased children if living at the time, and share alike, to wit: The children of Sophia A. Plummer, deceased, to receive the portion that she would have received, if living ; the children of Thomas Peinson, deceased, to receive the portion that he would have received, if living ; the children of Mary J. Kettler, deceased, to receive the portion that she would have received, if living ; the children of Lydia A. Hall, deceased, to receive the portion that she would have received, if living. I desire my entire estate to be distributed as above described, except \$100 I direct my executor to pay the trustees of the Christian church at Hannen's Creek, in Harrison township, Union county, Indiana, the interest only to be used by said trustees for the benefit of said church ; also, \$100 I desire my executor to pay to my granddaughter, Mary Wescott, over and above her portion as the heir of her mother."

The complaint, in substance, avers that the appellants were, at the time of the making of said will and the death of said testator, and still were, the living grandchildren of said Sophia A. Plummer, they being the children of two of her children who were deceased at the time of the making of said will ; that said Thomas Peinson, Mary Heltner and Lydia A. Hall, at the making of said will, had no grandchildren living, and

that the appellants were the only grandchildren of any of the deceased children named in said will; that by the following clause in said will, to wit, "I give and bequeath to the children of Sophia A. Plummer, deceased, the portion that she would have received if living," the appellants were included and became entitled to their portion of the legacy so bequeathed to the living children of said Sophia A. Plummer; that the word "children," as used in said will, meant and included grandchildren in the sense in which said phrase was used in said will, as would more fully appear by the whole will, a copy of which was filed with and made a part of the complaint; that Mary Wescott, named in said will, was the child of said Lydia A. Hall, who was the daughter of the testator; that the appellees, Thomas Plummer and Henry Plummer, were the only children of said Sophia J. Plummer living at the time of the making of said will, and that they were still living; that said will had been duly probated, and that the legacy belonging to the appellants and the appellees, Thomas Plummer and Henry Plummer, amounting to about \$2,400, was then in the hands of the appellee, Richard M. Haworth, as the executor of said will, for distribution, and that the appellants and the appellees, Thomas Plummer and Henry Plummer, constituted all the legatees of said Sophia A. Plummer; that said executor disputed the right of the appellants to any legacy under the will. Wherefore they prayed that they be adjudged legatees under the will, and entitled to their portion of said legacy, and that said executor be directed to pay the same, and for other relief.

The only question submitted for our consideration is, whether the appellants, as the grandchildren of Sophia A. Plummer, are entitled to participate, as legatees, in the distributive share of said estate, which, by the provisions of the will, was given to "the *children* of Sophia A. Plummer, deceased." There is no expression used in the provision of the will to which we have referred, or in any other provision, indicating, in any manner, that the word "children" was intended to be used by the testator in any other than its proper and ordinary signification, or evincing an intention or desire

on his part to make any provision whatever for the appellants, but, on the contrary, the language used in the will clearly indicated an intention or desire on his part to exclude them from participating in the distribution of his estate, as the will directs the executor of the will, after he has converted the real estate into money, to make distribution thereof among the testator's children, living, "and the *children* of his [my] children, *if living at the time.*" By this provision it is apparent that the appellant intended to confine the distribution of his estate, as to the children of his deceased children, to those of them who might be living at the time of the making of the distribution. And as it appears by the averments in the complaint that, at the time of the death of the testator, there were, and still are, children of Mrs. Plummer living, we think that they alone, as such children, are entitled to the share in the estate which Mrs. Plummer would have received if living.

In 2 Jarman on Wills (p. 690) it is said: "The legal construction of the word *children* accords with its popular signification; namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue. It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child." And in 2 Redfield on the Law of Wills (2d ed. p. 15) it is said: "The word 'children,' as well as all other similar descriptive terms of classes or relations, it will be borne in mind, must always be understood in wills in its primary and simple signification, where that can be done; in short, where there are any persons in existence, at the date of the will, or before the devise or legacy takes effect, answering the meaning of the term. And where the term 'children' has received a larger and more extended construction, as synonymous with issue, it has generally been based upon something in the will, unless it resulted as already intimated, from the fact that there were no children in existence."

The law, as above stated in the text-books to which we have referred, is recognized and fully sustained by an unbroken line

of decisions. Among the cases directly in point are the following: *Churchill v. Churchill*, 2 Met. (Ky.) 466; *Collins v. Hozie*, 9 Paige, 81; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Gardner v. Heyer*, 2 Paige, 11; *Mowatt v. Carow*, 7 Paige, 328; *Appeal of Gable*, 40 Pa. St. 231; *Ward v. Sutton*, 5 Ired. Eq. 421; *Hallowell v. Phipps*, 2 Whart. 376; *Dickinson v. Lee*, 4 Watts, 82; *Cutter v. Dougherty*, 23 Wend. 513; *Izard v. Izard*, 2 Des. Eq. (S. C.) 308; *Phillips v. Beall*, 9 Dana (Ky.), 1; *Ewing v. Handley*, 4 Littell, 346; *Osgood v. Lovering*, 33 Maine, 464; *Thompson v. Ludington*, 104 Mass. 193; *Low v. Harmony*, 72 N. Y. 408; *Castner's Appeal*, 88 Pa. St. 478; *Feit v. Vanatta*, 21 N. J. Eq. 84.

In *Churchill v. Churchill* (*supra*) the law is thus clearly and forcibly stated: "The technical legal import of the word 'children' accords with its ordinary and popular signification. It does not denote grandchildren; and, though sometimes used with that purpose and effect, there is no warrant for thus enlarging its meaning in construing a will, unless indispensably necessary to effectuate the obvious intent of the testator. It may be regarded as well settled that such enlarged or extended import of the word 'children,' when used as descriptive of persons to take under a will, is only permissible in two cases. *First*, from necessity, where the will would be otherwise inoperative; and, *second*, where the testator has shown by other words that he did not use the word in its ordinary and proper meaning, but in a more extended sense." The other cases cited are to the same effect.

No error was committed in sustaining the demurrer to the complaint.

See *Palmer v. Horn*, 2 Am. Prob. R. 92; *Huston v. Cook*, 3 Id. 41; *Halstead v. Hall*, *Ibid.* 462.

THOMAS vs. PEOPLE.

[107 Illinois, 517.]

ADMINISTRATION ON LIVING PERSON'S ESTATE.

The appointment of an administrator of the estate of a living person is void.

ACTION on bond of master in chancery.

Charles W. Thomas, for appellants.

Wilderman & Hamill, and *Henry M. Needles*, for appellee.

MULKEY, J. This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the Circuit Court of St. Clair county for the sum of \$703.87, in favor of the People of the State of Illinois, for the use of John Joiner, and against Charles W. Thomas, the appellant, and others, on his official bond as late master in chancery of St. Clair county.

It appears that after the execution of the bond sued on, and during his term of office, there came into Thomas' hands, as such master, certain moneys, being the proceeds of a sale of real estate, made by him in a partition proceeding, \$703.87 of which belonged to the said Joiner, and for which the recovery in this suit was had. Long before the partition proceedings, however, Joiner had left his home and people in St. Clair county, and his whereabouts was to them, and all his former acquaintances, wholly unknown. Not having been heard of by any of his relations or acquaintances for more than seven years, his brother, Daniel Joiner, acting upon the hypothesis he was dead, applied to and obtained from the County Court of St. Clair county letters of administration on his estate. After administration had been thus granted on John's estate upon the hypothesis that he was dead, the said Charles W. Thomas, upon formal demand by Daniel Joiner, paid to him, as the administrator of John, the latter's share in the proceeds of the partition sale. John subsequently, however, turned up alive, and on

Thomas' refusal to pay the claim a second time, instituted the present action, with the results already stated.

The foregoing facts are specially pleaded as a defense to the action, and the question for determination is, are they sufficient for that purpose. While the question has never before, so far as we are advised, been directly presented to this court, yet it is by no means a new one. It has frequently been mooted before the courts of this country and of England, though actual decisions directly upon the question are not very numerous. Judging from the cases where the point has come directly in judgment, as well as from judicial dicta and expressions of opinion to be found in the standard text-books, there has been but little diversity of opinion upon the question. The general doctrine on the subject undoubtedly is, that a grant of administration on a live man's estate, together with all acts done under such a grant, is absolutely null and void. (*Allen v. Dundos*, 3 T. R. 125; *Freeman on Judgments* [3d ed.], § 319a; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *D'Arusment v. Jones*, 4 Lea, 251; 40 Am. Rep. 12; *Stephenson v. Superior Court*, 15 Rep. [Col.] 140; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *Griffith v. Frazier*, 8 Cranch, 23.)

It is said by Freeman, in discussing the question, in his work on Judgments above cited: "The decrees and orders of a probate or surrogate's court, made in the exercise of jurisdiction conferred upon it by law, are as final and conclusive as the judgments, decrees or orders of any other court. The character and finality of *res judicata* attach to the decisions made in probate or surrogates' courts, irrespective of the nature of the issue determined, provided, always, that the court had jurisdiction to determine it. Hence, whether the adjudication be for or against the validity of a will, for or against granting letters of administration, allowing or disallowing an account, granting or refusing to grant a homestead, it is in either case a final settlement of the matter of which it assumes to dispose, and it can not be collaterally attacked, impeached or avoided in the same or in any other court by any of the parties thereto, nor by any person in privity with them. It is, however, as in other cases,

essential that the parties to be affected be brought within the jurisdiction of the court by the service of notice prescribed by law, and that the court have jurisdiction over the subject-matter. The question occasionally arises whether the grant of letters testamentary or of administration on the estate of a person in fact living, but supposed to be dead, is an act beyond the jurisdiction of the court, and therefore so utterly void that no person is protected in dealing with the executor or administrator while his letters remain unrevoked. The weight of authority is very decidedly to the effect that the decease of the supposed decedent is a prerequisite to the jurisdiction of the court, and that he is wholly unaffected by the proceedings for the settlement of his estate—the only adjudication, so far as we are aware, in conflict with the rule here stated, having been rendered by the Court of Appeals of the State of New York.” We fully concur in this general statement of the author on the subject.

In line with the doctrine here announced, it is said in *Melia v. Simmons* (*supra*): “The proceedings of administration, settlement and assignment of the estate of the respondent, represented to have been dead when he was and still is alive, are absolutely null and void, for all purposes whatsoever. * * * The County Court of Dodge county, or any other court, has no jurisdiction in this particular case or in such a class of cases. There is no class of cases which embraces the administration of the estates of living persons as if they were dead. The proceedings are void *ab initio* and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the County Court has in respect to the administration of estates, is over the estates of *dead* persons. It would seem that the bare statement of such a proposition is enough, without citing authorities.”

The only case we have been able to find, or to which our attention has been called, holding a contrary doctrine, is that of *Roderigas v. East River Savings Institution* (63 N. Y. 460)—referred to by Freeman in the above citation—which was de-

cided by a divided court of three to four, and has since been the subject of much adverse criticism. (10 Am. Law Reg. 787; 15 Id. 212.) The case, it is true, is placed upon the peculiar provisions of the New York statutes, but we confess we see nothing in them that seems to warrant the conclusions drawn from them. Moreover, we regard the authority of that case as a precedent, even in New York, much shaken by the reasoning of the New York Court of Appeals in the same case, when before it on a subsequent occasion. The case as last reported will be found in 76 N. Y. 316.

It must be conceded that if the Probate Court had authority to act at all in the particular case before it, then its adjudication, like that of any other court, became binding and conclusive upon all parties to the proceeding, until reversed or otherwise set aside. The real question therefore is, whether the court had any authority to act at all. The contention of appellant is, "that the jurisdiction of the Probate Court did not depend upon the death of Joiner, but upon the fact that that court was set in motion by the application for an administrator, and having been so set in motion, its jurisdiction to investigate and decide was complete, and its decision cannot be collaterally attacked as to anything the court was called upon to decide." This proposition, in the light of the facts as confessed upon the record before us, we regard as fundamentally erroneous. Jurisdiction, in the general and most appropriate sense of that term, as applied to the subject-matter of a suit at law or in equity, is always conferred by law, and it is a fatal error to suppose the power to decide in any case rests solely upon the averments in a pleading. It is true that a court is not permitted, on its own motion, to institute a suit between the parties to a controversy. As claimed by appellant, there must be a properly framed complaint or other pleading showing a cause of action within the jurisdiction of the court, before it can lawfully proceed to adjudicate. But behind all this there must be power in the court, conferred by law, to act in a real case of the character of the one supposed by the pleading or complaint, and if there is not, the whole proceeding, and all acts done under it, will be inoperative and void.

The position of appellant is well met by the case of *Griffith v. Frazier* (*supra*), where the question in hand came under consideration. Chief Justice Marshall, speaking for the court, said in that case: "To give the ordinary jurisdiction, a case in which by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate—it was not one committed to him by the law; and although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

The general proposition that under our system of government no one can be deprived of his life, liberty or property without due process of law, is not denied or questioned, and as John Joiner was in no sense a party to the proceeding before the Probate Court when letters on his estate were granted, on what principle can he be said to be bound by the action of the court in making the grant? The general rule unquestionably is, that no one is bound by an adjudication of which he had no notice or to which he was not a party. Testing the present case by this rule, appellee is clearly not bound.

But it is said the grant of letters upon an estate is in the nature of a proceeding *in rem*, and therefore the case in hand does not come within the rule mentioned—that the proceeding being against the estate itself, those having an interest in it

must look out for themselves. Conceding this to be so, what follows? Are we to conclude, because the law confers power upon the Probate Court to grant administration on a dead man's estate, upon a mere *ex parte* petition, that it therefore follows the court may lawfully make such grant upon a live man's estate, and that even without giving him an opportunity to be heard? By the 18th section of article 6, of the present constitution, in defining the probate jurisdiction of County Courts, it is declared: "County Courts shall be courts of record, and shall have original jurisdiction in all matters of probate and *settlement of estates of deceased persons*," &c. Thus the County Court, as a Court of Probate, is expressly clothed with power to settle estates of "*deceased persons*," and this, according to a familiar rule of construction, by implication forbids the exercise of such power over the estates of *live persons*.

Regarding, then, the administration of a dead man's estate as a proceeding *in rem*, and looking to the constitutional limitation of the court's power in such cases, what is the first essential condition to the exercise of this power? Manifestly the existence of a *dead person's* estate, for the court has no power to grant administration on any other kind of an estate, and any attempt to do so will necessarily be inoperative and void. In every proceeding *in rem*, and in every case in the nature of a proceeding *in rem*, there is some great central controlling fact upon which the jurisdiction or power in the court to act at all depends, and such fact must have an actual existence, otherwise the jurisdiction will fail. (*Thompson v. Whitman*, 18 Wall. 457; *Wheelwright v. Depeyster*, 1 Johns. 471; *Rose v. Hunsly*, 4 Cranch, 269.) In the case last cited it is said by Chief Justice Marshall, speaking for the court: "Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment—or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this

condemnation operated a change of property." With equal propriety it may be said, if by any means a Probate Court should grant letters of administration upon the estate of one still living, the title of the owner of such estate could not thereby be affected. The great central fact in this class of cases, as we have already seen, is the existence of a decedent's estate subject to administration and distribution by the Probate Court of the proper county. It is confessed, upon the record before us, that in the present case the owner of the estate in question at the time of the grant of letters was, and still is, alive. It follows, therefore, the grant was unauthorized and void.

The cases of *Wight v. Wallbaum* (39 Ill. 563), *Dodge v. Cole* (97 Id. 338), and other cases cited by appellant, are supposed to be inconsistent with the view here taken. We do not think so. In the *Wight Case* there was no defect of jurisdiction. There was present the *estate of a dead man* to be administered. This *actual* fact authorized the court to proceed, and a mere irregularity in the proceeding could not, as was held in that case, be taken advantage of in a collateral proceeding. So in the *Dodge Case*, there was an insane person to be cared for and protected by a Court of Chancery. That was the great central fact in that case upon which the jurisdiction of the court depended. If, in that case, there had been no insane person, and such fact had been admitted upon the record, as is here, then that and the present case would be in principle alike; but such is not the fact. Take the common case of a proceeding in admiralty to enforce maritime liens against a ship or other water craft. Unquestionably before the court could lawfully proceed there would have to exist, as a fact, a ship, or other maritime vessel, subject to the order and adjudication of the court, otherwise it would have no power to act at all. Suppose, in a case of that kind, the liens sought to be enforced were, in point of fact, on a private residence situated upon dry land, and the court should nevertheless, after hearing the case, go on and order a sale of the premises, would the owner's title to the property be thereby divested? Surely not. And why so? Simply because the

court had no power or jurisdiction to act at all in that kind of case.

All persons are presumed to know the law, and hence, in theory at least, there can be no great hardship in holding that every one acts at his peril in dealing with an administrator who has been appointed upon a mere presumption that his supposed intestate is dead. Every one dealing with an administrator thus appointed is conclusively presumed to know, if the supposed intestate should subsequently turn up alive, the grant of administration, and all acts done under it, would be absolutely void.

The judgment will be affirmed.

Judgment affirmed.

See *Melia v. Simmons*, 1 Am. Prob. R. 143, and cases in note on page 146; *D'Arment v. Jones*, 2 Id. 424; *Stevenson v. Superior Court*, 3 Id. 424; *Devlin v. Commonwealth*, *ante*, page 76.

BARNUM vs. MAYOR OF BALTIMORE.

[62 Maryland, 275.]

CHARITABLE USE.—CERTAINTY OF BENEFICIARY.—DEVISE CONDITIONAL ON RELIGIOUS CONNECTION.

A devise to the city of Baltimore in trust for the "McDonogh Educational Fund and Institute," is sufficiently descriptive of a municipal organization constituted by city ordinance, styled the "Board of Trustees of the McDonogh Educational Fund and Institute," the school managed by the board being known as the "McDonogh Institute."

A devise may lawfully be made conditional that the devisee withdraw from the priesthood of a specified church, or from any society connected therewith, or refrain from forming any such connection.

ACTION to declare the rights of parties under a will.

Thomas A. Whelan and *John H. Thomas*, for appellants.

James L. McLane, City Counsellor, and *I. Nevett Steele*, for appellees.

ALVEY, C. J. The bill in this case was filed by Samuel H. Tagart, executor and trustee appointed by the will of Zenus Barnum, deceased, for the purpose of having the rights of parties declared in respect to a large portion of the estate of the deceased, which is claimed by his heirs at law and next of kin as against the disposition thereof made by the will. The disposition of the property as made by the will was sustained by the decree of the court below, and the heirs at law and next of kin of the testator have appealed.

The testator died on the 23d of March, 1882, having made his will in due form, which was soon after his death admitted to probate. He left surviving him, as his only heirs at law and next of kin, two brothers and two sisters, one of the brothers being Frank Barnum, upon whose election the principal question in this case has arisen. The estate has been settled by the executor, and the question now is, upon the events that have happened, who is entitled to the estate?

The testator, by his will, devised and bequeathed in trust to his friend, Samuel H. Tagart, and to his successors in the trust, the entire estate, real and personal, of which he died seized and possessed; and after declaring certain uses, and investing the trustee with certain powers, he proceeded to declare the principal trust of his will, in regard to the property now in controversy, in the following terms:

"In the second place, in trust, as to all the rest and residue of my estate, to appropriate and apply the net income thereof, as follows:

"If, within twelve months after my decease, my brother, Frank Barnum, shall withdraw from the priesthood in the Roman Catholic Church (should he be at the time of my death a priest in said church), and from any and every order or society connected with said church, of which he may be a member, and until he shall become a priest or deacon in said church, or shall connect himself with some order or society of said church, or until the income of said property, or some part thereof, shall be sought to be subjected to the payment of his debts or liabilities by legal process, I direct that the net income of said rest and residue of my estate, be

paid to the said Frank Barnum in every year, in such instalments as the said trustee, or his successor or successors, may deem best, for and during the term of the natural life of the said Frank Barnum.

* * * * *

“ But if within twelve months after the time of my death, my brother shall not have withdrawn from the priesthood aforesaid (should he be at the time of my death a priest in said church), and from any and every order or society of which he may be a member, connected with said church, or if he shall at any time hereafter become a priest or deacon in said church, or become a member of any order or society of said church, or if said income, or any part thereof, shall be sought to be subjected by legal process to the payment of his debts or liabilities, and he shall be without wife or children, or if he shall die without leaving a child or children living at the time of his death, who shall attain the age of twenty-one years, then (subject to the life-estate or estate for widowhood aforesaid in one-third thereof), I give, devise and bequeath the said rest and residue of my estate to the Mayor and City Council of Baltimore, in trust for the McDonogh Educational Fund and Institute, to be applied to establishing a chair therein, to be called the ‘Zen-us Barnum Chair,’ to promulgate such a course of instruction in said institute as will aid in the practical application of the mechanical arts—the said estate and property to be held under the same control and direction as the estate and property now held by said fund and institute, and to be so appropriated and applied as to give boys in that institution such useful and practical mechanical education as will enable them to gain a livelihood by skillful manual labor—the surplus income, after the payment of the professor, to be applied to the erection of necessary buildings, and furnishing needed tools and the like for the above mentioned purposes.”

It is conceded that at the time of the testator's death, his brother, Frank Barnum, was not a priest or deacon in, nor a member of, or connected with, any order or society of the Roman Catholic Church; but that on the 31st of July, 1882, he became a member of, and connected himself with, an order

or society of that church, and he has remained so connected ever since. He was unmarried and without issue at the time of the death of the testator, and has so remained to the present time. It also appears that after the present bill was filed, an attachment was sued out against Frank Barnum, on a judgment against him, and laid in the hands of Tagart, the trustee, to affect the interest under the will. That proceeding is still pending.

It is agreed that the only fund held by the Mayor and City Council of Baltimore, derived from the estate of John McDonogh, at the date of the will of Zenus Barnum, the testator, is the sum of \$650,000, and that the only object or purpose to which any portion of that sum was or has been applied, is to the establishment, maintenance and support of the "School Farm" in Baltimore county, known as the "McDonogh Institute." It is admitted that such School Farm was established about the year 1872, and that it has been ever since in operation. It is admitted that several professors are employed, and many boys are taught therein; and that there is no other school or institute in this State known as the "McDonogh Institute." This school or institute was established and has been maintained by the funds alone which were received by the Mayor and City Council under the will of John McDonogh, and its establishment, and the government thereof, have been under and in pursuance of ordinances and resolutions of the Mayor and City Council by an agency styled "The Board of Trustees of the McDonogh Educational Fund and Institute," created by ordinance.

For a full history of the origin, objects and purposes, terms and conditions of the McDonogh school or educational fund bequeathed to the city of Baltimore, and of the "School Farm" directed by the will of McDonogh to be founded by the city, reference may be made to the case of *McDonogh v. Murdock* (15 How. 367), where all the facts appear, and the rights of the city under the will of McDonogh were declared and established.

It appears from the answers of the appellants, and the opinion of the learned judge below, that several questions were

raised in the Circuit Court, upon the construction of the will of Barnum, that have not been discussed by counsel in this court. The proposition, or rather suggestion, made in the answers of the appellants, that as Frank Barnum was not a priest, deacon, or member of any order or society, connected with the Roman Catholic Church, at the time of the death of his brother, he therefore took no interest or estate under the will, has no support in any principle of fair construction; and the learned judge below was quite right in holding that Frank Barnum took the equitable estate, and became entitled to the income thereof, from the death of the testator to the time of his becoming a member of the order or society connected with the church. And so in regard to the question of its being against public policy to make the devise or bequest dependent upon the condition that the devisee or legatee should withdraw from the priesthood or membership of any order or society connected with the church, or refrain from forming any such connection, the authorities leave no room to question the right of the testator to prescribe such condition. Whatever may be thought of the opinions of the testator, or his prejudices, the law recognizes his right to make the enjoyment of his bounty dependent upon the condition attached in this case. (*Mitchell v. Mitchell*, 18 Md. 405; *Vidal v. Girard*, 2 How. 127, 199; *Dickson, Ex parte*, 1 Sim. [N. S.] 37.)

The principal question involved in the case is, whether, upon the determination of the estate of Frank Barnum, the limitation over of the trust estate to the Mayor and City Council of Baltimore, for the purposes mentioned, be valid, and of a nature to be executed in accordance with the intention of the testator. That question has been most fully and ably argued by counsel at the bar, and with the assistance derived from such discussion, we have been enabled to come to a definite conclusion as to the rights of the parties under the will.

On the part of the heirs at law and next of kin of the deceased, it has been strongly contended that the limitation over to the Mayor and City Council in trust is void, because of the want of power in the municipal corporation to accept and hold the trust created by the will, and because of the undefined and

uncertain object of the trust, or rather its non-legal entity, and the consequent impossibility to enforce the execution of that trust, according to the plan of the testator. And the familiar cases of *Dashiell v. Atty.-Genl.* (5 H. & J. 392); *Wilderman v. M. & C. C. Balto.* (8 Md. 551); *Needles v. Martin* (33 Md. 609); *Church Extension, &c. v. Smith* (56 Md. 362), and *Rizer v. Perry* (58 Md. 112), have been relied upon and enforced upon us as being entirely conclusive of the proposition sought to be maintained. But this court is of opinion that the cases relied on do not, by any means, conclude the question presented in this case.

Those cases are quite distinguishable from this in many respects; and while it is true that the Statute of 43 Elizabeth, ch. 4, in regard to charities and charitable donations, has never been adopted in this State, it does not follow that charitable bequests or donations, such as that designed by the testator in the will before us, may not be sustained, altogether apart from and independent of the provisions of that statute. If there be parties capable of taking the subject-matter of the trust, and objects legal and definite, to be subserved or benefited by its execution, so that a court of equity may take cognizance of and enforce the trust, these are the essentials, and only essentials, to the validity of the trust, though the object of the trust be in its nature charitable. In cases where these essential elements of certainty exist, there is no greater difficulty in the exercise of the supervisory power of a Court of Chancery over a trust for charity than there is in the exercise of such power over trusts of any other nature. The Court of Chancery in such cases only exercises its original inherent jurisdiction over trusts. In respect to trusts for charity, irrespective of the provisions of the Statute of 43 Elizabeth, ch. 4, the question that most frequently arises, and the one that has given the greatest difficulty is, whether the objects intended to be benefited or promoted are sufficiently certain and definite to enable the court to declare who are entitled, to the exclusion of all others, and to secure to them the benefit of the trust. In the cases relied on by the appellants, the donations failed because of the uncertain

and indefinite character of the objects of the charities intended to be established.

In this case, the first question to be determined is, whether the municipal corporation of the city of Baltimore is capable of taking devises and bequests of real and personal estate for the objects and purposes mentioned in the will; and the second, whether these uses are charitable uses, valid in their nature, and sufficiently certain and definite to be carried into execution, and enforced by a court of equity.

1. With respect to the first question, the original charter of Baltimore city, granted by the Legislature in 1796, ch. 68, invested the corporation with power to "purchase and hold real, personal and mixed property, or dispose of the same, for the benefit of the said city;" and this power the corporation still holds. (Code Pub. L. L. Art. 4, § 1.) Whether this power enabled the corporation to take real and personal property *in trust*, it is unnecessary to decide in this case; though, according to the great weight of authority, it would seem to be entirely capable of taking property *in trust*, for purposes germane to the objects of the corporation, or which would promote, aid or assist in carrying out or perfecting those objects. (2 Kent's Com. 280; 2 Dill. Mun. Corp. [3d ed.] § 567, and cases there cited; *Vidal v. Girard*, 2 How. 127; *McDonogh v. Murdock*, 15 How. 367; *Perine v. Carey*, 24 How. 645.) In the charter of Baltimore city, however, there is express power conferred in respect to this subject. By the Act of 1842, ch. 86, since forming part of the charter of the city, it is provided that the "corporation may receive in trust, and may control for the purpose of such trusts, all money or other property which may have been or shall be bestowed upon such corporation by will, deed, or in any other form of gift or conveyance in trust for any general corporation purpose, or in aid of the indigent and poor, or for the general purposes of education, or for charitable purposes of any description within the said city." (Code Pub. Local Law, Art. 4, § 2.) A more comprehensive power could not be desired, and it would seem to embrace the very subject of contention in this case. It authorizes by express terms the corporation to accept and hold *in trust* any prop-

erty given *for purposes of education, or for charities of any description*. The fund bequeathed to the city in trust, by the will before us, is for purposes of education, as well as for a charitable purpose; and if there was no question as to the objects of the charity, or as to the power of a court of equity to enforce the execution of the trust, there could be no room for controversy.

In regard to the bequest of McDonogh to the city of Baltimore of funds in trust, for the establishment of a charity to promote education and industry, the Supreme Court of the United States, in the case already referred to of *McDonogh v. Murdock* (15 How. 413), held the city to have capacity to receive and hold the funds in trust for the purposes designated; and in speaking of the application of the trust fund, the court say: "All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied. Nor can we perceive why a designation of the particular use, if within the general objects of the corporation, can affect the result; nor is there anything in the nature of the uses declared in this will which can withdraw from the legacy a legal protection." And so in this case. The city is authorized and required by the laws of the State to establish and maintain a system of free schools for the benefit of its citizens, and therefore the subject of education is within the general objects of the corporation, and there can be no good reason why the particular designation of the use, and the manner of appropriation of the fund in question, should be subject to legal objection. It is devoted or dedicated to a great public benefit; it promotes, aids and assists in carrying out and perfecting the objects of the corporation.

But it is argued for the appellants that the provision of the charter of the city authorizing the holding of property in trust, only so authorizes where the objects and purposes of the trust are of a certain and well defined nature, and capable of being enforced; that it was not the object of that provision of the charter to change the pre-existing law, and to prescribe what definition of trusts should be sufficient, or to declare that the

corporation might take property in trust, where the objects and purposes are so indefinite as to be beyond the power of a court of equity to compel enforcement of the trust. And without stopping to consider whether this be the correct interpretation of the provision of the statute or not, it is sufficient for us to say that the requirements of this case do not make it necessary that we should, in this respect, hold the contrary of that for which the appellants contend. In our view of this case, the construction of the statute, further than to see that it authorizes the corporation to receive and hold the property in trust for educational and charitable purposes, is wholly unnecessary. We therefore forego further remark upon it.

2. We come now to the second question, and that is, whether the objects and purposes, and the beneficiaries of the trust, are sufficiently certain and defined to render the trust valid, and to enable a court of equity, by virtue of its inherent jurisdiction and power over trusts, to enforce the trust in accordance with the plan and intent of the testator. And of this we entertain no doubt.

In the event that has occurred, the testator devised and bequeathed the rest and residue of his estate to the Mayor and City Council of Baltimore, in trust for the McDonogh Educational Fund and Institute, to be applied to establishing a chair therein to be called the "Zenus Barnum Chair," to promulgate such course of instruction in said institute as will aid in the practical application of the mechanical arts. He then declares that the property so given shall be held under the same control and direction as the estate and property now held by said Fund and Institute, and to be so appropriated and applied as to give boys in that institution such useful and practical mechanical education as will enable them to gain a livelihood by skillful manual labor. This is certainly a benevolent and charitable design, and falls fully within the legal definition of a charity. It is therefore entitled to the most liberal construction for its support.

As we have already stated, it is conceded that there never has been any such incorporated body as the "McDonogh Educational Fund and Institute;" but that there has been for many

years, and still is in existence, a municipal organization or agency, constituted by ordinance of the city, under the name and style of the "Board of Trustees of the McDonogh Educational Fund and Institute," for the administration of the educational fund derived under the will of McDonogh. This board is clothed with large powers for the management of the fund, and for keeping intact their own body. It appears that the funds derived from the McDonogh estate not being sufficient to establish and maintain the free school or schools contemplated by McDonogh, such funds have been devoted exclusively to the purchase, the establishment and maintaining of the "School Farm," authorized and directed to be maintained by the will. This farm, with its organized school thereon—with its teachers and pupils—is known as the "McDonogh Institute." And this "School Farm," and school thereon, are, by ordinance of the city, under the exclusive management and control of the "Board of Trustees of the McDonogh Educational Fund and Institute." By the ordinance constituting the board and defining its powers, it is provided that "all the money, securities, and property of every kind and description, with the increment thereof, which has or may come to the city (from the McDonogh estate), shall pass to and be vested in said board of trustees."

Now, with respect to the intention of the testator, in view of all the admitted facts of this case, we cannot perceive that there is any well grounded room for doubt that he intended the estate given to be managed and controlled by the "Board of Trustees of the McDonogh Educational Fund and Institute," and that it should be applied by that municipal agency, in the manner designated in the will, in connection with and as part of the "McDonogh Institute." That is the only educational institute, founded upon the McDonogh fund, to which he could have referred; and we must suppose that he knew perfectly well how that charity was organized, and by what agency it was controlled. And that being so, what uncertainty or difficulty can there be in the application of the fund to the purpose and objects designated by the testator? If the city was capable of taking and organizing for the administration of the McDonogh

fund, why should it not be equally capable of taking and applying the Barnum fund? Seeing that both funds have a common object to subserve, and that the latter is but an adjunct to the former, and both being in aid and promotive of the general objects of the municipal corporation, both are equally within and subject to the administrative control of the agency instituted by the city ordinance.

It is objected that the "Board of Trustees of the McDonogh Educational Fund and Institute" is not an incorporated body; and that "The McDonogh Institute" is not situated within the limits of the city; and therefore the beneficiaries of the trust are uncertain and undefined, and without legal identification as a body; and that the school or institute, being beyond the limits of the city, the fund does not constitute a trust for the benefit of the citizens of the municipality, within the meaning of the charter. But in neither of these objections do we perceive that there is any such insuperable difficulty in maintaining the validity of the trust, as is supposed by the objectors.

The municipal corporation, taking the fund in trust, takes it for the benefit of its citizens or the public, to be applied according to the terms of the trust. It is therefore, in a certain sense, *cestui que trust* as well as trustee. The property acquired by it, though in trust, is for a public use; and the corporation is liable for the execution of the trust by and through the agencies it may create for the purpose. It is not the agencies of the municipal corporation so much to which we must look for the execution of the trust, as to the corporation itself. Therefore, if the present bequest, instead of being to the city in trust for an educational purpose, had been to the city in trust to establish or maintain a house of correction, a hospital or pest-house, within or without the city, there can be no doubt of the validity of such trust, and that the objects would be sufficiently defined, notwithstanding the trustees or managers of such institutions, appointed by the city, had never been incorporated by law. And that being so, there can be no substantial reason assigned why the present bequest is not equally good. Nor is the fact that the "McDonogh Institute" is located beyond the

limits of the city, a substantial objection to the validity of the trust. The Institute or School Farm is managed by city agencies, and for the benefit of the citizens of the corporation; and there is nothing to forbid, either in the bequest itself, or in the charter of the city, the present location of what is known as the "McDonogh Institute." The ordinance providing for the board of trustees or managers, authorized the purchase of the farm, and the erection of the buildings thereon, in the vicinity of the city; and it has never been supposed that there was any legal objection to the power thus conferred upon the managers.

Lastly, it has been very earnestly argued against the validity of this trust, that there is no power or jurisdiction by the exercise of which the trust can be enforced; that if it be established, to use the strong language of the brief, "no power on earth can prevent the corporation from using the property for the establishment and maintenance of a pest-house, or an almshouse; for the support of its fire department, or its water department, or for any other corporate purpose." And if such proposition were maintainable upon authority, we should desire no further argument to justify us in declaring against the validity of the trust. But we are far from acceding to the correctness of the position thus assumed on the part of the appellants, as applied to a case like the present. No principle is now better settled than that where property is held by a municipal corporation *in trust*, or where the trust reposed in the corporation is for a charity within the scope of its duties, a Court of Chancery will prevent the misapplication of the trust funds, and compel the execution of the trust. And this jurisdiction is not founded upon the Statute of 43 Elizabeth, but is part of the original inherent jurisdiction of the Court of Chancery over the subject of trusts. The court will interpose and exercise its jurisdiction at the instance of the attorney-general, or, according to many authoritative precedents, upon the application of the corporators or persons interested. The result of the authorities upon the subject is well stated by Judge Dillon in his work on Municipal Corporations; and without doing more, we may refer to that valuable work, and the

cases there collated by the learned author. (2 Dill. Mun. Corp. [3d ed.] §§ 567, 909; *Att'y-Gen'l v. City of Dublin*, 1 Bligh [N. R.], 312.)

It follows from what we have said, that, in the opinion of this court, the decree appealed from must be affirmed; and it is so ordered.

Decree affirmed.

Conditions as to a beneficiary's connection with the priesthood, being a nun, &c., &c.—In the case of Dickson's Trust, 1 Sim (N. S.), 87, it appeared that a testator having made a will in which he had made certain provision for a daughter, added subsequently the following codicil:

"In the distribution of my personal property in my said will, I left the sum of 10,000*l.* to my executors therein named, in trust to pay the interest of that sum to my daughter, M., during her life, etc., etc. But now finding that she contemplates remaining in a Roman Catholic convent, and becoming a nun, I consequently hereby declare that in the event of her carrying out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she would forfeit all claim to a benefit from the said sum of 10,000*l.*, and I hereby in that case revoke the said bequest; and in order to prevent any portion of my property from being appropriated to other purposes than the benefit of my family, I hereby exclude my said daughter M. from all reversionary advantages whatever from my said will."

In construing this codicil Cranworth, V. C., said:—"The relief asked would be matter of course if the title of the petitioner had rested on the will alone, under which she certainly took an interest for her life in the funds in question. But the question is how far that interest is affected by the codicil; it being admitted, at the bar, by the counsel for the petitioner, that she has associated herself permanently with a Roman Catholic establishment in the nature of a convent, and so has brought herself within the purview of the clause of forfeiture contained in the codicil.

"The first point for inquiry is what, under the circumstances which have happened, are the intentions of the testator as expressed on the face of the will and codicil. On this point there cannot, I conceive, be any doubt whatever. The testator in terms says: 'If my daughter associates herself permanently with a Roman Catholic establishment, then I revoke the bequest in her favor of 10,000*l.*;' that is, 'on such an event occurring my will is to be read as if it had contained no such bequest.' It is impossible for an intention to be more clearly expressed.

"The intention then being clear, the next question is whether it is a lawful intention? What doubt can exist on this point? It is surely competent to a testator, by a clause properly framed, to limit the interest which he gives to his daughter to such a time as she shall remain unconnected with a convent, and if this may be lawfully done by an original limitation of the interest given, there can be nothing unlawful in a clause framed for bringing about the same result by means of a condition subsequent. Independently, therefore, of authority, I should have thought the case was free from doubt. The intention, it is admitted, is a lawful intention, and expressed so as to leave no doubt as to what it is. Why is the Court not to carry it into effect? The ground relied on by the petitioner is a supposed rule of law that whenever a legacy is given absolutely in the first instance, but followed by a declaration that it shall be forfeited, or that it is revoked if the legatee does not comply with some condition subsequent mentioned in the will, there, unless on the non-compliance with such condition the legacy is given over, the clause of forfeiture or revocation is inoperative, being treated as a mere idle threat to induce the legatee to comply with the condition, and not really to affect the bequest. I do not, however, think that any such rule of law exists. The argument in favor of the existence of such a rule was derived from a supposed analogy between the case put and the case of a bequest which the testator has declared shall be forfeited on the marriage of the legatee. In such cases there are, no doubt, very numerous authorities for the proposition that the legatee takes an absolute legacy, and that the condition subsequent, attempting to defeat it on the legatee contracting marriage, is void. The condition is said to have been introduced by the testator merely *in terrorem*, and not to have been intended really to affect the interest of the legatee. It is impossible to refer to the numerous cases on this subject without feeling that the judges in deciding them have never felt very sure of the ground on which they were treading. It is, however, certain that the decisions have proceeded on maxims of the Civil and not the Common law. Now by the Civil law any condition in restraint of marriage was considered as a condition *rei non licita*, and, therefore, in whatever form imposed, it was held to be null and void. The subject is discussed in the 35th Book of the Pandects, cap. 33, *et seq.*, to which it is sufficient to refer. * * * * * Now, in the present case, there is certainly no gift over. There is merely a revocation of the legacy on the happening of the event which has occurred, namely, the legatee associating herself with a Roman Catholic establishment. If, therefore, this was to be treated (like a condition in restraint of marriage, or a condition not to dispute the will, or not to aliene) as a condition *rei non licita*, the doctrine to which I have referred would apply. The testator would have been treated as merely expressing strongly his wish on a subject on which

he had no right to impose restraint, and that expression of wish would have been inoperative. But the condition here imposed is a perfectly lawful condition. There is neither principle nor authority for saying that a parent may not make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is *conditio rei licita*, and so the rule derived from conditions in restraint of marriage, or otherwise against the liberty of the law, are inapplicable. That being so I can discover no principle or authority for saying that this Court is not to give full effect to the intention, because it is contained in a condition subsequent. All we have to do is to ascertain what, in the events which have happened, is the meaning of the testator as expressed on the face of his will. As to this there can be no doubt. That state of circumstances has occurred in which the testator expressly says he does not mean his daughter to have any interest in the 10,000*l.*, and I am, therefore, of opinion that she is not entitled to it. The petition must, therefore, be dismissed. The question being one relating solely to the trust of this particular legacy, the costs must come out of the fund which has given rise to the necessity for an application to the Court."

In *Spencer v. See*, 5 Redf. (Surr.) 442, where a testator left one-third of his estate to a trustee, the income to be paid to a grandson, "upon the express condition that the said S. shall renounce the Roman Catholic priesthood; said payment of interest to commence at the time of said renunciation." The validity of such a condition was not questioned, and it was held that the interest of S. in his grandfather's estate was not assignable; that the act of S. in executing a sealed instrument in which he recited that he never intended to renounce the priesthood or to marry, and conveyed all his interest under the will to the trustee, was nugatory; that the bequest was not upon a contingency, but upon conditions precedent, neither of which had been performed, and that therefore the legacy did not vest and nothing passed by the assignment. But in a later case, involving the construction of the same will, it was held that the trustee by the release got an absolute title; that S. was competent to contract; that, while he could convey nothing because he had nothing to convey, he could waive a condition, made in his favor, by deed just as in reality he would have done by living his life out and adhering to his refusal to marry or renounce the priesthood, and that inasmuch as his brother (the trustee) held an estate in trust for his benefit upon his performing certain conditions, it was competent for S. to renounce at once the condition, and release his claim and let the estate pass. *Kenyon v. See*, 29 Hun, 212.

In *Magee v. O'Neill*, 19 S. C. 170, in a learned opinion, it was held that a bequest on the condition that the beneficiary, an infant, be "educated in some Roman Catholic female seminary or school, and is reared as a Roman Catholic in the communion and faith of her deceased father,"

but that, in case she be not so educated and reared, the legacy should be paid over to specified persons, will be sustained, and that such a condition is neither uncertain, impossible, against public policy, nor unconstitutional.

PECK'S APPEAL.

[50 Connecticut, 562.]

REVIVAL OF EARLY WILL OR REVOCATION OF LATER.

A prior will is revived by the destruction of a later one not containing any general revocation of earlier testaments.

PROCEEDINGS to probate a will.

H. S. Barbour and *C. W. Gillette*, for plaintiff.

R. D. Hubbard and *F. L. Hungerford*, for appellees.

CARPENTER, J. In 1875 Lucy A. Peck made a will, which was duly executed. In 1880 she made another, which was inconsistent with the former. Not long afterwards she died. The later will has never been found; the former was carefully preserved by her and found among her valuable papers after her death. The new will did not expressly revoke the old. The testatrix was advised by the scrivener who wrote the last will to destroy the first; but it was not done, and when he left the room the two wills were lying upon the table. No one now living knows of the existence of the last will after that time.

Upon these facts the Superior Court, as a conclusion of law, found the issue for the appellees, and affirmed the judgment of the court of probate rejecting the first will. The case is before us on a motion in error.

The defendants in error contend that the execution of the

latter will operated immediately as a revocation of the former, and that the former was not revived by the destruction of the latter. The Superior Court sustained this claim.

Prior to 1821 any will might be revoked in writing, and it was not necessary that the writing should be executed with every particular formality. It was then held that a revocation contained in another will was not ambulatory, but took effect immediately, and that the will revoked could not be revived without a re-publication. (*James v. Marvin*, 3 Conn. 576.) In 1821 a statute enacted that "no devise of real estate shall be revoked otherwise than by burning, * * * or by some other will or codicil in writing, declaring the same, signed by the testator in the presence of three or more witnesses, and by them attested in his presence." That section required that a written revocation should be in another will; and so the law continued until the revision of 1849, in which the words "declaring the same" were omitted, and have not since appeared in the statute. In that revision the section concluded as follows:—"or by some other will or codicil duly executed according to this act."

In 1875 the phraseology was further changed, so that the whole section now reads: "No will or codicil shall be revoked, except by burning, canceling, tearing, or obliterating it by the testator, or by some person in his presence, by his direction; or by a later will or codicil." The change in the words, however, did not change its meaning, so far as it relates to the question now under consideration.

Prior to 1821, as well as since, the law was so that a later will when it took effect by the death of the testator revoked a prior inconsistent one. That proposition is not questioned. If *James v. Marvin* is an authority before the statute, a subsequent will, containing no revocatory clause, did not, during the life-time of the testator, revoke a prior will. In respect to that point we do not think the statute was intended to make any change.

In the case cited the court in fact decided two questions:—1st, that a clause in a will revoking former wills took effect immediately; and 2d, that if the subsequent will contained no

such clause it did not affect former wills until it became operative. The first question was directly before the court; the second was only incidentally involved.

Now the second question is directly raised and the first is incidentally involved. In the former case the statute was not in force, now it is. The statute comes before us now for the first time for a construction. And it must be remembered that the statute changes the aspect of the first question. It is not now what it was when *James v. Marvin* was decided. Then any written declaration to that effect revoked a will irrespective of any statute and without regard to the death of the testator. Now the statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments. Under the statute it may be claimed, and the claim sustained by very respectable authorities, and supported by reasoning of considerable force, that the will, even though it contain a clause expressly revoking former wills, must take effect as a will before the revoking clause will be operative. Thus it will be seen that this precise question as it now presents itself was not decided in *James v. Marvin*, and has never been decided by this court. We do not propose to decide it now, but as it is very difficult to consider fully and satisfactorily the real question in this case without discussing to some extent the other question, we will briefly refer to the state of the law on that question.

The law as laid down by Hosmer, C. J., relating to the effect of a revoking clause in a subsequent will, is questioned by an eminent writer on the law of wills. (1 Redfield on Wills, 328.) After referring to the Connecticut case, he says: "This doctrine has an air of plausibility, from the fact that an instrument of revocation alone would unquestionably have this effect. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will, with a revocatory clause, is made dependent, in some sense, upon the subsequent will going into operation. And there is ordinarily no purpose of having the revocatory clause operate except upon that condition. The

whole instrument is, therefore, ambulatory, and when destroyed, it all ceases to have any operation." And such seems to be the doctrine of *Laughton v. Atkins*, 1 Pick. 535; *Reid v. Borland*, 14 Mass. 208; *Simbery v. Mason & Hyde*, Comyns, 451; *Hyde v. Hyde*, 3 Chan. Rep. 155, and *Onions v. Tyrer*, 2 Vern. 742.

On the other hand, *James v. Marvin*, we are inclined to think, has been regarded as law, by the profession, under the statute for more than sixty years. And there are many other cases which seem to assume that such is the law without directly deciding the point.

The weight of authority seems to be in harmony with the views expressed by Mr. Redfield. We refer to it not for the purpose of deciding the point, but for the purpose of applying the reasoning and the authorities cited to the point we are now considering; and we think they apply with much greater force to a will not containing the revocatory clause. We are decidedly of the opinion that if we hold that the execution of the second will operated to revoke the first, we shall go counter to the prevailing current of authority, and produce a greater discordance between our own law and the laws of other jurisdictions than now exists; a result certainly which it is desirable to avoid.

We also think that to be the most reasonable view. The testatrix by executing the second will evinced no intention to become intestate, but rather a contrary intention. By destroying the last will and carefully preserving the first she affords satisfactory evidence that she intended until the very last to die testate, and that that should be her will. In the absence of an express provision to that effect, we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator. The statute requires a "later will or codicil." We think that means an operative will or codicil.

In *James v. Marvin*, Hosmer, C. J., says: "The revocation effected by a will *merely* is not instantaneous, but ambulatory until the death of the testator; for although by making a

second will the testator intends to revoke the former, yet he may change his intention at any time before his death." This doctrine is consistent with the statute; and, although the case did not call for it, yet it has been understood to be the law of this State for more than sixty years. We see no reason for changing it, even if the law in some jurisdictions is different.

We would say, however, that we have carefully examined the cases cited by the counsel for the appellees, and find that many of them are cases in which the later wills became operative as wills; and of course the language of the courts must be interpreted with reference to that circumstance, and cannot properly be applied to a case like this.

The judgment of the Superior Court was erroneous and is reversed.

In this opinion the other judges concurred.

See *Scott v. Fink*, 2 Am. Prob. R. 410; *Pickens v. Davis*, 3 Id. 225.

SHIMER vs. MANN.

[99 Indiana, 190.]

RULE IN SHELLEY'S CASE.

A devise of the rents and profits of land until the youngest child of the devisee becomes of age, upon the happening of which event "the fee simple of said lands shall then vest absolutely in the said M. (devisee) and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," gives the devisee an estate in fee when his child attains majority.

ACTION for partition.

A. C. Ayres, E. A. Brown and E. C. Buskirk, for appellant.

G. W. Spahr and P. W. Smith, for appellee.

ELLIOTT, J. On the 12th day of May, 1856, Lydia Lathan executed her last will containing these provisions :

"Item : I give, devise and bequeath to my late husband's nephew, Samuel B. Mann, all my personal estate, except my family Bible, which I give and bequeath to my niece, Martha Bane.

"Item : I give and bequeath to the said Samuel B. Mann the rents and profits of twenty (20) acres of land situate, lying and being in Warren township, Marion county, Indiana, near and adjoining to the lands of Esquire Shimer, until the youngest child of the said Samuel B. Mann shall become of age, upon the happening of which event it is my will and pleasure that the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest."

The Samuel B. Mann named in the will was the nephew of the testatrix, and, at the time the will was executed, had three children living, Loren, James and Harvey L. Mann. Lydia Lathan died on the 13th day of June, 1857, and at the time of her death her nephew and devisee had no other children than those named. Of these the appellee was the youngest. In February, 1865, Samuel B. and Loren Mann united in a warranty deed purporting to convey the land to the appellant. The appellee arrived at full age in August, 1873, and instituted this suit for partition, claiming an undivided one-third of the land.

The right of the appellee to maintain his claim depends upon the construction of the will of Lydia Lathan. The ruling question in the case, shortly stated, is this: Does the will devise to Samuel B. Mann an estate in fee vesting absolutely when

his youngest child attains full age, or does it vest the fee jointly in him and his children living at the time of the death of the testatrix ?

Where a deed or a will uses the word "heirs," and uses it in its ordinary legal signification, a fee is vested in the first taker. This is the effect and force of the rule in *Shelley's Case* (1 Co. 88), and that rule enters into our law as a rule of property. (*Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *Maxwell v. Featherston*, 83 Ind. 339.) If the will under discussion is governed by that rule, Samuel B. Mann, the first taker took an estate in fee. Whether the will is or is not governed by that rule, depends upon the answer to the question whether there is anything in the situation of the parties, or in the context of the instrument, plainly indicating an intention to assign to the words of limitation a meaning different from their ordinary legal signification.

There is a material difference between deeds and wills, and much more liberality is exercised in the construction of the latter instruments than in the former, for, where a will is presented for construction, the chief effort of the courts is to discover and carry into execution the intention of its author, and, to this end, minor considerations are subordinated. (*Brooks v. Evetts*, 33 Texas, 732.) But, while this is true, it is also true that where words of definite legal meaning are employed, they will be assigned that meaning, unless the context of the instrument makes it plain that the testator employed them in a different sense.

In *Nelson v. Davis* (35 Ind. 474) the court quoted the statement of Chancellor Walworth, made in *Schoenmaker v. Sheely* (3 Denio, 485), that "The word children, in its primary or natural sense, is always a word of purchase, and not a word of limitation; and the word issue is very frequently a word of purchase also. But heirs, and heirs of the body, are, in their primary and natural sense, words of limitation, and not of purchase." The definition adopted by the Chancellor is one

that has long been recognized and accepted by the courts, and the strictness with which they have adhered to this definition has exercised a potent influence upon the disposition of lands by deeds and wills. (2 Redf. Wills, 61; 3 Jarman's Wills [5 Am. ed.], 115.) The word "heirs," written in a deed or will, is one of great power, and its force is not impaired by the mere use of negating or restraining words. Fearné expresses this doctrine in very strong words, for he declares that "the most positive direction" will not defeat the operation of the rule in *Shelley's Case*. (2 Fearné's Remainders, section 453.) It may be that this statement of the law is somewhat too strong under the doctrine of later cases, but certainly the law is that mere negating words cannot restrain or impair the force of the word "heirs." (3 Jarman's Wills [5 Am. ed.], 115.)

We have no doubt that the word "heirs" may be construed to mean children where it is plain that the testator employed it in that sense. (*Ridgeway v. Lanphear*, 99 Ind. 251; *Hull v. Beals*, 23 Ind. 25; *Star Glass Co. v. Morey*, 108 Mass. 570; *Scott v. Guernsey*, 48 N. Y. 106; *Uriah's Appeal*, 86 Pa. St. 386; s. o. 27 Am. R. 707; *King v. Beck*, 15 Ohio, 559; *Guthrie's Appeal*, 37 Pa. St. 9; *Jordan v. Adams*, 9 C. B. [N. S.] 483; *North v. Martin*, 6 Sim. 266.) While it is true that the word "heirs" may be explained to mean children, it is also true that this meaning cannot be assigned to the word unless it very clearly appears that it was employed by the testator in that sense. The courts have used very strong language upon this subject. In one case Lord Redesdale said: "The rule is, that the technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." (*Jesson v. Wright*, 2 Bligh [H. L. Cas.], 1, 56.) Stronger still is the statement of Lord Denman, who said: "Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." (*Doe v. Gallini*, 5 Barn. & Adol. 621.) Redfield says: "Conjec-

ture, doubt, or even equilibrium of apparent intention, will not suffice." (2 Redf. Wills [2d ed.], 67; *Guthrie's Appeal*, *supra*; *Jordan v. Adams*, *supra*; *Poole v. Poole*, 3 B. & P. 620; *Doebler's Appeal*, 64 Pa. St. 9.)

The language employed by the testatrix in the final clause of the last item of the will is, "upon the happening of which event it is my will and pleasure that the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," and this clause certainly does not evince an intention to use the word "heirs" as meaning children; so far, indeed, is it from doing this, that it does the exact opposite, for it in terms vests a fee in Mann and his heirs, and declares that he may dispose of the estate, or that his heirs may do so. If we ascribe to this language its usual force and effect, we are carried to the conclusion that the testatrix intended, that upon the happening of the designated event Samuel B. Mann should be invested with an absolute power of disposition, but that if he died without exercising this right, then his heirs should be invested with it, and this conclusion makes it apparent that the word "heirs" was employed in its technical sense. The right of disposition is first vested in Samuel B. Mann, and this is in exact agreement with the technical import of the term "heirs" as well as with the phrase, "the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs." The language employed in describing the power of alienation does not import a joint power, but a several one; for the disjunctive form of the conjunction is used, and the effect is to declare that either may dispose of the estate, postponing, however, the rights of those who may become heirs to those of the person first named. As Mann could have no heirs during his life, the power of disposition was first and fully in him as the first taker, and in his heirs only upon his decease, and, without any express provision to that effect, this would have been the force of the words "fee simple" as well as of the word "heirs." (1 Preston's Estates, 71, 72, 73.)

Superadded words, which merely describe or specify the incidents of the estates created by such a word of limitation as "heirs," do not cut down the interest of the devisee. If we regard as explanatory the words which follow the term "his heirs" in the will under examination, then, unless we wrench them from their natural meaning, we must treat them as more specifically describing the duration of the estate devised, for these words do not detract from the force of the word "heirs," but, if that be possible, add to its force, because they describe an absolute power of alienation, which is one of the chief incidents of the estate which the use of the word "heirs" operates to create. It may not have been necessary to describe a power incident to the estate created, but that an unnecessary thing was done cannot break the force of what the books often say is "a powerful word." "The proper and technical mode of limiting an estate in fee simple," says Mr. Jarman, "is to give the property to the devisee and his heirs, or to him, his heirs and assigns forever." (3 Jarman's Wills, 30.) These words were here used and, as we have seen, it is the duty of the courts to affix to technical words their usual meaning, unless there is a clear manifestation of a purpose to use them in a different sense, and here the explanatory words, instead of manifesting such a contrary intention, exhibit an entirely different one, for they particularize incidents of the very estate which the technical words describe and devise.

It is contended that the word "or" should be read as "and" where it occurs in the clauses regarding the disposition of the land devised to Samuel B. Mann and his heirs. It is unquestionably true that the word "or" may often be assigned a conjunctive instead of a disjunctive effect. (1 Redf. Wills, 471; 1 Jarman's Wills, 419.) But changes of this nature are only made where it is clearly necessary to effectuate the intention of the testator or give meaning and force to the will. The rule has long been settled that the word "or" will be read "and" when it is necessary to give effect to the words creating an estate of inheritance, but we know of no case holding that the word "or" will be read "and" for the purpose

of defeating the effect of words accurately and clearly devising an estate of that nature. (*Right v. Day*, 16 East, 67; *Read v. Snell*, 2 Atk. 642; *Harrison v. Bowe*, 3 Jones' Eq. 478.) The word "heirs" is one of dominating force, and it may sometimes compel a change of subordinate connective words, but connective words cannot be changed when they are in harmony with the controlling provisions of the will; much less can they be changed when the ruling words of the instrument would be weakened or obscured by the change. (1 *Preston's Estates*, 367.) It is only in clear cases that courts ever venture to make changes. No word, great or small, can be changed, except, to borrow a phrase from Redfield, upon "the clearest certainty." (1 *Redf. Wills*, 471; *Holcombe v. Lake*, 4 Zab. 686.)

It is no slight obstacle to the success of the appellee that it become necessary for him to require that the courts wrench the well known term "heirs" from its legal meaning, and also change the words of the will by substituting words not found in it for those that are. The obstacle is all the greater, because the explanatory words of the instrument fully harmonize with its technical terms, and add to their force, thus tending, with great power, to show that the intention of the testator was to devise just such an estate as the technical words employed would do if they stood alone.

The devise of the income of the land to Samuel B. Mann until his youngest child shall become of age is neither unintelligible, nor is it inconsistent with the theory that the testatrix intended that he should take a fee upon the happening of that event, nor does it even make an unreasonable testamentary disposition of the land. It is perfectly reasonable to presume what, in truth, the language plainly imports, that the testatrix meant to deprive him of the power of disposing of the property so long as his children were unable to make their way in the world, so that he should have means of supporting them that he could not fritter away or lose by speculation or mismanagement. It may well be that she meant that as long as his children were not of age the power of disposition should be fettered, and that as soon as they attained full age he should

have complete power over the property to do with it as he chose. Such a scheme of testamentary disposition is quite intelligible and perfectly reasonable, and in this instance entirely consistent with the whole frame and tenor of the will. More apt technical words to vest an estate, ripening into an absolute and unconditional fee upon the happening of a prescribed condition, could not have been chosen, than those adopted, and these words are in harmony with the general scheme evidenced by the whole tenor of the instrument by which the testatrix declared her intention regarding the disposition of her land.

The only persons designated as devisees, direct or remote, are Samuel B. Mann and his heirs. There is not a word expressive of an intention to give to him and to his children. The youngest child is not mentioned as a devisee, nor is any child; the reference to the youngest child is simply for the purpose of confining the conditional devise to a fixed time, namely, the time when that child attains full age. It is only in this connection that the word "child" is used; it is not used as descriptive of the object of the testatrix's bounty; it is simply used as marking the time when the devisee's estate shall ripen into an absolute fee simple. It is declared that upon the event of the youngest child attaining full age, the fee simple of said land shall then vest absolutely in said Samuel B. Mann and his heirs; but it is not intimated, directly or indirectly, that it shall vest in him and his children. It would be a violent stretch of judicial power to thrust in devisees neither named nor described in the will. Had the word "child" been used for any other purpose than that of fixing the time when the estate should enlarge into a fee, there would be much more force in the contention of the appellee, but it was used for that and no other purpose.

It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. This is what the will now before us does. In the present case both the particular estate and the remainder are in Samuel B. Mann, and the only doubt is whether the estate can be said to

have ever been a defeasible one. (*Boraston's Case*, 3 Coke, 19; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 Ad. & Ell. 636; *Roomes v. Phillips*, 24 N. Y. 463; *Phipps v. Ackers*, 9 Cl. & F. 583; *Edwards v. Hammond*, 3 Lev. 132.)

It is the theory of the law that the particular estate and the remainder form one united estate, and that the whole estate issues out of the grantor at the same time, and if this be true, as it undeniably is, it would seem that the fee vests at once in the person to whom both the particular estate and the remainder are devised. (2 Washb. R. P. [4th ed.] 582, 596; 4 Kent's Com. [12th ed.] 199; *Brattle Square Church v. Grant*, 3 Gray, 142; 2 Bl. Com. 166.)

We need not, however, decide the question whether the estate in fee vested absolutely in Samuel B. Mann at the time of the testatrix's death, for, conceding that he took only a conditional fee, still, as the condition upon which the estate was granted had happened, his rights became absolutely vested. If the estate was a conditional fee, it became absolute when the contingency arose which destroyed the force of the condition. (1 Preston's Estates, 476.) We think that the devise must be regarded as creating a conditional or limited fee, restricting the right of alienation until the youngest child of the devisee arrives at full age.

A conditional fee may be created by a will as well as by a deed, and, as Preston says, "The existence of the condition precludes the estate of that simplicity which is the essential quality of a fee simple." (1 Preston's Estates, 475, 476.) The existence of a condition subsequent does not, however, destroy the inheritable character of the estate. In the devise contained in the will before us, the condition is one restraining the power of alienation until a definite and specified time. Conditions like the one written in this will are effective, for they do not unreasonably restrict the power of alienation. (*Langdon v. Ingram*, 28 Ind. 360; 1 Washb. R. P. top p. 80, side 54.)

Counsel for appellee assert that "There is no question that the will gives to Samuel B. Mann a fee simple to an undivided

part. The only question is whether Samuel B. Mann became vested with a fee simple title to the whole." The difficulty of maintaining the appellee's position is, that all the granting or devising words in the will import a several right in the devisee named, and do not imply a joint estate in him and others. (*O'Brien v. Heeney*, 2 Edw. Ch. 242.) To sustain this position all the words importing a several estate must be changed so as to make them describe a joint estate. To reach this conclusion it is not only necessary to change the word "or" into "and," but it is also necessary to change the singular pronoun "he" into the plural "they." We have already seen that changes are never made unless there is an imperious necessity, and there is here no such necessity, for the general frame of the will indicates an intention to make the devisee named the recipient of the bounty of the testatrix. But there are also the words "Samuel B. Mann and his heirs," still further manifesting, and in the most appropriate legal terms, the intention to bestow the estate upon one person, and not upon three persons.

It is said that no one can have an heir during his life, and, therefore, that the words "his heirs" mean his children. The premise is true, but the conclusion does not follow. A devise to a man and his heirs vests an estate of inheritance which will go to the legal heirs, whether they are children or other kinsmen. At common law the word "heir" or "heirs" was the strongest term that could be used to create a fee, and in many cases was indispensably necessary to create such an estate. It cannot, therefore, be logically possible that because the term "heirs" is used, the devise is limited to children and the estate of the first taker cut down to an estate for life. If this conclusion be just, then for many centuries courts and authors have given a radically erroneous meaning to the words "his heirs."

The argument that, because the devisee named has living children at the time the will was made, the words "his heirs" mean his children, proves, if it proves anything, too much, and thus works its own overthrow. If this argument be sound, then all devises using those words create only a life-

estate if there are children of the devisee living, and that this is not true all the cases upon the subject declare in most emphatic terms. If the words used are such as create an estate in fee, that estate the devisee takes, no matter whether he has or has not living children. The argument finds no support from any decision, nor can it be supported on principle; it is, indeed, flatly opposed on all sides, for the term "heirs" is the term which, of all others, most strongly expresses an intention not to limit the estate to the children, but to bestow it in the most ample manner upon the devisee who first takes the estate.

In the case of *Vannorsdall v. Van Deventer* (51 Barb. 137) the will gave to the wife of the testator all of his real estate during her life-time, and then proceeded as follows: "*Fourth.* I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased. *Fifth.* And the legal heirs of my sister, Maria Snyder, deceased. *Sixth.* I give and bequeath to the heirs of my brother-in-law, William Van Deventer, all my real estate at the death of my wife, Elizabeth, to be divided equally between each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall." The court held that the word "heirs" should be held to mean children of the persons named. There are several points of difference between the will in that case and the one in this, but it is only necessary to name one to show that the two cases are governed by entirely different principles. In the cases cited the words of inheritance, "legal heirs," did not follow the name of the first taker; here they do. What has been said respecting the difference between the case cited and the present is equally true of the case of *Heard v. Horton*, 1 Denio, 165. It emphasizes this difference to note that in the case just named the contention was that the first taker took a fee, not by force of words creating such an estate, but by implication arising out of the fact that he paid a legacy charged upon the land devised. The point decided in *Simms v. Garrot* (1 Dev. & Batt. Eq. 393) was this: "A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children." Here

the devise is to "Samuel B. Mann and his heirs," and this statement of itself fully exhibits the difference between the two cases. The devise in *Burchett v. Durdant* (2 Vent. 311) was: "I give to my cousin, John Higden, and his heirs, during the life only of Robert Durdant, my kinsman, all those my messuages, etc., in Chobham in the county of Surrey; upon this trust and confidence, that he the said John Higden and his heirs, shall permit and suffer the said Robert Durdant, during his life, to have and receive the rents and profits thereof, which shall yearly grow due and payable. * * * And from and after the decease of Robert Durdant, then do I give said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living, and to such other heirs male and female as he shall hereafter happen to have of his body; and for want of such heirs, then to the use and behoof of my cousin, Gideon Durdant and the heirs of his body."

The holding of the court, as the reporter gives it, was: "That this was a remainder vested in George Durdant; for the remainder being limited to the heirs of the body of Robert Durdant, now living, and George being found to be then the only son, it was a sufficient designation of the person, and as much as if it had been said, to his heir apparent," and that "George Durdant took an estate tail." In the case under immediate mention the words of inheritance were not coupled with the name of the devisee, but the devise was definitely and expressly to him during his life. The words "to his heirs" are found in a distinct clause, reading: "And from and after the decease of Robert Durdant, then do I give the said lands and premises in Chobham unto the heirs males of the body of him, the said Robert Durdant, now living." There was no first taker of the fee named coupled with words of limitation, but words describing persons who should take after the life expired are used. It is plain that this clause described a person, or a class, who were to take, and that as the devise to the ancestor was during life, and as there were no words of limitation coupled with his name, the persons described, as devisees of the fee, took by virtue of the devise, and not by

inheritance. In the case at bar the words of limitation are appropriately coupled with the name of the devisee, and there are no words descriptive of a class, or of a person, except the named devisee; all the words employed are words of limitation directly annexed to the name of the first taker, and their effect is to measure the extent of the estate devised to the first named devisee. In *Darbison v. Beaumont* (1 P. Wms. 229) the testator, after devising the estate to trustees for a term of years, settled it on "the first son of his body lawfully begotten, and the heirs male of such first son lawfully issuing," and this was held to be a description of the person entitled to take. In the case cited there was no devise with words of limitation to a designated person. There was nothing more than a description of the person entitled to take the inheritance, and this distinguishes the case from the class to which the present belongs. It would have been very different if, in the case cited, a first taker had been designated, and his name followed by words of limitation, but there was nothing of the kind in the will.

Where the appropriate words of limitation follow, and are appropriately connected with the name of the first taker, an estate in fee is created, unless the superadded words clearly cut down the estate. This is an old and firmly established rule, and we have not travelled an untrodden path in reaching the conclusion that the words of limitation, coupled with the name of the devisee, do not describe a class who are to take by devise, but operate to vest in the first taker an estate in fee simple. In the case of *Jack v. Featherston* (9 Bligh, 237) the subject received a thorough discussion. Tindal, C. J., in the course of his opinion, said: "The words which first occur in the devise, 'I give to my kinsman, William Featherston and his heirs male my real estates,' do, in a will, give to the devisee a clear and unequivocal estate tail. The only question, therefore, is, whether the words which follow do with equal clearness and certainty cut down the estate tail so given to the devisee into an estate for life, and make his sons to take estates tail as purchasers, instead of by limitation." In *Poole v. Poole* (3 B. & P. 620) Lord Alvanley said: "The first taker" shall

be held to have an estate tail "where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." The case of *Toller v. Attwood* (15 Q. B. 929) is not unlike the present; there the devise was to E. for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs male of the body of E. to be begotten, who shall live to attain the age of twenty-one years, and to his heirs and assigns forever, and it was held that the words, "who shall live to attain the age of twenty-one years," could not restrict the force of the words of limitation contained in the devise, and that E. took an estate tail. There are very many other cases declaring this doctrine. (*Mills v. Seward*, 1 J. & H. 733; *Grimson v. Downing*, 4 Drew. 125; *Anderson v. Anderson*, 30 Beav. 209; *Moore v. Brooks*, 12 Gratt. 135; *Tipton v. La Rose*, 27 Ind. 484; *Small v. Howland*, 14 Ind. 592.) In attaching great weight to the words of limitation, "his heirs," used, as they are, in close conjunction with the name of the first taker in the devise before us, we do no more than obey a rule which has, as Chancellor Kent says, for more than five hundred years formed part of the law, and upon which this court has again and again built its judgments. In thus regarding the words, we bring this case within the great class of cases found in the books, and distinguish it from the class of cases represented by *Burchett v. Durdant* (*supra*) and *Darbison v. Beaumont* (*supra*). The class represented by these cases is, in numbers, very limited, and, in character, somewhat anomalous, but there is nothing in the decisions in the cases belonging to that class which antagonizes the great rule of property which controls cases like the one at bar. In all of the cases represented by *Burchett v. Durdant* (*supra*) and *Darbison v. Beaumont* (*supra*) the words of the devise were to the heirs of a person named, not to a named person and his heirs, as "to the heirs of Robert Durdant," and this phrase is rightly construed to mean kinsmen, for, otherwise, there would be no one capable of taking, because no man can have heirs during life; but where the devise is to A. and his heirs, there is a person

capable of taking the whole estate, and with his name are connected words of limitation describing such an estate. If, in the case of *Burchett v. Durdant* (*supra*), the devise had read to Robert Durdant and his heirs, then the case would have been in principle like the one in hand; but there was no such provision. There was a provision essentially different, describing a class who were to take, and excluding, in unmistakably plain terms, the first taker from anything more than a life-estate.

Judgment of the General Term of the Superior Court reversed, with costs.

BRINLEY vs. GROU.

[50 Connecticut, 66.]

INCREASE IN STOCK.—PRINCIPAL OR INCOME.

The right to subscribe for new shares upon an increase of stock, the new stock when issued, and any profit resulting from a sale of the right to such subscription, are part of the principal of a trust fund of shares issued before such increase, and this with a clause in the will directing payments of the "dividends and increase" to the beneficiaries annually.

ACTION for construction of a will.

W. Hamersley, for plaintiffs.

C. E. Perkins, *G. Collier* and *R. Welles*, for defendants.

PARDEE, J. John Grou died in 1866, leaving a will containing the following clause: "I give, devise and bequeath to George Brinley, Oliver G. Terry and William J. Hamersley, and their successors in office, the sum of one hundred thousand dollars, to have and to hold the same upon the trust and confidence following: that is to say, they shall invest and hold the same for the use and benefit of my four children, John Grou, Jr., George Grou, Mary J. Vail, and William D. Grou, during

their natural lives, and shall pay to them equally the rents, dividends, increase and income thereof annually, after deducting the expenses of said trust, one-fourth to each during his or her life. If any of my children should die leaving issue living at their decease, his share or her share shall then be transferred to said children free from said trust; but if they should die leaving no children, the same shall be held in trust for the use and benefit of the survivors; and if all die without issue, then the estate is to go to my legal heirs."

The testator at the time of his death was the owner of three hundred and thirty-three shares of the stock of the *Ætna Insurance Company*; of these shares two hundred and forty-four became a part of the fund then created, at a valuation of \$194 per share. The assets of the company then exceeded its liabilities to the amount of about \$355,000. In 1881 the capital of the company was \$3,000,000; its accumulated profits \$3,000,000; and the market value of a share was \$282. In that year it increased its capital from \$3,000,000 to \$4,000,000, apportioning the ten thousand new shares *pro rata* among the stockholders, they paying in \$100 per share. The trustees thereby acquired the right to subscribe for eighty-one and one-third shares; they sold the right to subscribe for thirty-four and one-third shares, receiving therefor \$4,859.50; and of this sum they applied \$4,700 to payment for forty-seven shares. After the increase the market value of a share was \$232; in February, 1882, the date of this complaint, it was \$235. The dividend for the year preceding the increase was twenty per cent.; for the year succeeding, sixteen per cent.

The plaintiffs, the trustees under the will, allege that George Grou, William D. Grou and Mary J. Vail (John Grou, Jr., having died without issue and they taking his interest as survivors), claim to be entitled to receive these forty-seven shares of new stock in the proportion to which they are entitled to the annual rents, dividends, increase and income of the trust fund, and that it should be transferred to them; and that Thomas J. Vail, husband of Mary J. Vail, claims that these forty-seven shares are, and should remain, a part of the capital of the fund.

The trustees ask the Superior Court to determine the following questions :

1st. Whether the legal effect of the provisions of the trust in the will is such as to entitle the *cestuis que trust* to the right to subscribe to the new stock.

2d. Whether the provisions of the trust require the plaintiffs to hold as a part of the trust fund the new stock so purchased by them, or to divide same among the *cestuis que trust*, as a part of the rents, dividends, increase and income of the trust fund.

3d. Whether the *cestuis que trust* are entitled, as a part of the rents, dividends, increase and income of the trust fund, to subscribe for any portion of the new stock, or are entitled to any proportion of the profits that may arise from the purchase and sale of the new stock, or to any proportional part of the market value of the right to subscribe for such new stock at the time such subscriptions are made.

4th. In the event that the trust entitles the *cestuis que trust* to receive as annual rents, dividends, increase and income, any share of the benefit accruing to the trust fund by reason of the increase of stock by the *Ætna Insurance Company*, in what proportion does the benefit go to the *cestuis que trust*?

The Superior Court has asked the advice of this court upon these questions.

A shareholder has no proprietary interest in the accumulated profits properly retained by a corporation for the protection of its capital; he cannot acquire one by summoning it to make a rest in its business and take an account of them; he first obtains one when it has either in fact, form or intent set his proportion thereof as a dividend to his individual credit. This, of course, is the measure of the right of a life-tenant; there is to him only a possibility that the profits may be divided, or that the use of them by the corporation may increase its dividend during his term.

In the case before us, neither in fact nor form did the corporation make any division, or part with any portion of its earnings in behalf of the stockholders. On the contrary it manifestly desired to retain its surplus intact and increase its

strength by the addition of a million of dollars to its capital; its accumulated earnings all remained its property and subject to the risks of its business. It offered to the shareholders the privilege of paying in this sum; investors were of the opinion that this privilege was worth a premium; not because it carried with it the right then or ever to demand any portion of the surplus retained in good faith by the company, but presumably because they believed that from the income from its capital, surplus, and business, it would make regular dividends largely in excess of the ordinary rate of interest.

The increase in market value above cost of the shares constituting the capital of this fund, resulting either from an accumulation of profits by the corporation or from its vote to permit each one of its proprietors to purchase a fraction of a new share because he was the owner of an existing one, belonged to and formed a constituent part of this last, and of course of the capital. If the trustees had sold the existing share, and thereby had realized the increased value resulting from either of the mentioned causes, the entire proceeds of the sale would have still formed a part of the capital; and the excess in market value above cost of the right to purchase such fraction also belongs to and forms a constituent part of the existing share and of course of the capital; and when the trustees realized this excess by a sale of the privilege, the proceeds remained a part of that capital. In short, all of the increase of value which is realized from the act of the trustees in selling either the existing share with the privilege annexed, or the privilege severed therefrom, belongs to the capital; purchasers pay it from their money; all that is realized from the act of the corporation in making dividends belongs to the life-tenant. (*Atkins v. Albree*, 12 Allen, 359; *Moss' Appeal*, 83 Penn. St. 264.) And this regardless of the question whether profits were accumulated before or after the purchase of shares by the trustee; if before, and a dividend is made immediately after, it is the good fortune and the property of the life-tenant; if after, and the corporation does not divide them during the life-tenancy, it is the advantage of the remainder-man. Each must take the risk of his time, both as to the success of the business

and as to the action of the directors in the matter of dividends.

Again, it is said that the will, which is the law of the case, requires the transfer of these forty shares to the life-tenants, by the requirement that the trustees shall annually pay to them "the rents, dividends, increase and income" of the trust fund; that in the life of the testator the company had on three occasions increased its capital; that he foresaw that it would do so again; and that the word "increase" points to such an event. But, looking at the whole instrument, we are unable to find therein expressed any other intention in reference to that part of the fund invested in *Ætna Insurance* stock, than that his children should receive all that the company should actually separate from its funds and set to the trustees as dividends thereon.

The Superior Court is advised that the forty-seven shares paid for are a part of the principal of the fund, to be retained by the trustees as such.

In this opinion the other judges concurred.

See *Vinton's Appeal*, 8 Am. Prob. R. 281; *Hemenway v. Hemenway*, Ib. 429; *Biddle's Appeal*, Ib. 442; *Richardson v. Richardson*, *post*, p. 352.

JOHNSON *vs.* LAWRENCE.

[95 New York, 154.]

DOUBLE COMMISSIONS.—EXECUTOR AND TRUSTEE.

Where, by the terms or true construction of a will, the functions of executor and trustee vested in the same person co-exist from the death of the testator to the final discharge, interwoven so that no point of time is fixed in the will for the expiration of either function, compensation in both capacities cannot be allowed.

ACTION to recover statutory share of commissions.

Homer A. Nelson, for appellants.

N. Pendleton Schenck, for respondent.

FINCH, J. Double commissions have been awarded in this case for services purely constructive, and having no real existence. That the same person may be entitled to compensation as executor, and also as trustee, in respect to the same estate, or some part thereof, is undoubtedly true, but does not follow in every instance where trust duties are imposed upon an executor. Where, by the terms or true construction of the will, the two functions with their corresponding duties co-exist, and run from the death of the testator to the final discharge—interwoven, inseparable and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin—double commissions or compensation in both capacities cannot be properly allowed. Substantially this was said in *Hurlburt v. Durant* (88 N. Y. 121), although it was not then attempted to decide the precise question, and the doctrine asserted is fairly deducible from the adjudged cases. In *Valentine v. Valentine* (2 Barb. Ch. 430) the estate consisted both of real and personal property, the former of which the executors were authorized to sell. After some general legacies, the testator directed the residue to be divided between his three sons, but one of them being a lunatic, his share was ordered to be invested, the income being made applicable to his support during life, and at his death the principal being made payable to his children in equal shares. The learned chancellor decided that the funds in the hands of the executors for the benefit of the lunatic and his children were held by them in their character of executors, and the trust and the executorship were inseparable. And the court added, that “the case would have been different if the executors had been directed by the will to pay over this part of the fund to one of their number as a trustee, upon a separate and distinct trust.” Double commissions were, therefore, denied. The decision

was founded upon the doctrine that the trust and the executorship were inseparable under the terms of the will, and the double functions and double duties were blended and co-existed to the end. The case establishes the rule, although it may not be beyond criticism as applied to the facts before the court. *Drake v. Price* (5 N. Y. 430) was a similar case of a trust to secure income to a daughter for life, with remainder payable to her lawful heirs; and the precedent set by the chancellor was followed and double commissions denied. Paige, J., however, dissented, and sought to distinguish the case from *Valentine v. Valentine* by the observation that in that case the trust had not been assumed by the executors "by an investment of the trust moneys, and the consequent separation" of the trust fund from the general funds of the estate. The ground of dissent conceded the doctrine of the principal case, but went upon the theory that the trust and executorship were separable by the terms of the will, and that such separation had actually and in truth been made. And it is this view of the dissenting opinion which won our concurrence in *Hurlburt v. Durant*. The two earlier cases referred to were cited with approval in *Hall v. Hall* (78 N. Y. 539), and the difference between them drawn by the dissenting opinion of Paige, J., noted. That case further cited *Lansing v. Lansing* (45 Barb. 182), and *Mann v. Lawrence* (3 Bradf. 424), in both of which there were special trusts, but not separated from the bulk of the estate by an actual investment of the specific trust funds for the sole use of the beneficiaries. The facts in *Hall v. Hall* showed that the testator denominated his executors, in different parts of the will, trustees, and that circumstance was relied upon; but this court said that the words were used interchangeably and as synonymous, and that the bequest of the fund to the executors, and their survivors and successors indicated rather a trust attached to the office, than imposed upon the individuals. The executors had an accounting in 1874, on which they were allowed full commissions as executors. Four years later, one of the legatees, to whom income had been paid during her minority, having come of age, a final accounting was had. The executors claimed commissions as trustees on her

share, although that had never been in fact separated from the general fund in their hands, but the claim was disallowed; the chief judge saying: "There seems to be neither authority nor reason for holding that there has been any such separation of the fund, or paying over to the appellants as trustees, or any holding by them as such, as to entitle them to the extra compensation denied by the surrogate." In the course of the opinion other cases cited by the appellant were referred to. In one of them (*Matter of Carman*, 3 Redf. 47) there had been an accounting, and the surrogate had ordered a specific sum to be set apart and held for a beneficiary under the will, which the trustees did, opening a separate account, and taking out that specific fund from the general assets held by them as executors; and in another case it was said a final decree had discharged the executors as such and they had retained the fund as trustees as directed. *Ward v. Ford* (4 Redf. 45) is an example of such a case, and the surrogate there held that the will clearly created a trust in the hands of the executors, distinct and separate from their duties as such.

Taking the adjudged cases together, they appear to establish that, to entitle the same persons to commissions as executors and as trustees, the will must provide, either by express terms or by fair intendment, for the separation of the two functions and duties, one duty to precede the other and to be performed before the latter is begun, or substantially so performed; and must not provide for the co-existence, continuously and from the beginning, of the two functions and duties; and that where the will does so provide for the separate and successive duties, that of trustee must be actually entered upon and its performance begun, either by a real severance of the trust fund from the general assets, or a judicial decree which wholly discharges the executor and leaves him acting and liable only as trustee.

An examination of the will in the present case satisfies us that the trust duties, and those of the executors, co-existed from the issue of letters testamentary down to the present action, and that no separation of such duties at any point of time was contemplated by the testator, except in one emergency, which has not yet arisen. The first clause of the will, in a very short sentence, directs the payment of debts. The second clause

then proceeds to require the executors, or such of them as should qualify, "their survivors or successors," to carry on with testator's "estate and property" his present business, under the firm name of Garner & Co., during the life of his wife and his daughter Florence, and that the profits beyond the sums set apart for their support should be added to the "working capital" of his estate. After fixing the annual sums to be paid out of income, the testator directed that, upon the death of his wife and daughter, the business should be closed, and the estate divided among his children. As some part of it consisted of real property, he gave to his executors a power of sale, and in the last clause of his will made them guardians of the estates of his children during their minority. It is apparent that from the very beginning the duties of the executors were blended inseparably with the trust duties, and were so intended to remain. There could be no trust fund as a separate and distinct entity from the general body of the estate until the final division. There was no point of time, prior to that division, at which it could be said that one function ended and the other began. On the contrary, the ordinary duty of an executor to turn the estate into money, was suspended at the outset, and in its room was put the duty of carrying on the business with all the assets on hand. That duty began at once. As a trust duty it sprang into life at the same instant with the executorship, and inextricably blended with it. It existed only by force of the official character, and could not stand without it. The business to be conducted by the executors was at once conducted as executors, and became an additional duty imposed upon them as such. The two functions were made one; were interwoven at the beginning and exercised together; and no moment was indicated by the frame of the will when one should end and the other begin. To make a division at the death of Florence was a clear duty put upon the executors. To enable them to effect that purpose they were empowered as executors to sell the real estate and close up the business. Until then the duties, blended at the beginning, were to remain united, and the trust was not separate and distinct, but characterized and modified the duty of the executors. The only separation contemplated by

the will was indicated by the provision making the executors guardians of the property of the children. The wife is already dead. If now Florence should die the business would close and the division be made. But at that moment the remaining children may be minors. The shares of each will then be payable by the surviving executors to themselves as testamentary guardians, and the executors as such can be wholly discharged with all their duties ended. The existence of that possible emergency indicates the only separation of duties present in the intention of the testator, and shows how great a wrong it would be to take from this estate as commissions more than \$700,000 by compensating the same persons in the threefold capacity of executors, trustees, and guardians. As in the case of *Hall v. Hall*, the trust duty is imposed upon the executors, their survivors or successors. As in that case, a power of sale, not yet exercised, was given to the executors to dispose of the real estate preparatory to distribution. But stronger than in that case is the conviction, which this will carries, of an intention not to impose trust duties as separate and distinct from the functions of the executors. Suppose Johnson had not died, but at that date had been removed from his office as executor. Could we have then said that he remained trustee and might continue to manage the business and make the final distribution notwithstanding such removal? Has any point of time arrived at which, within the provisions of the will, and in the contemplation of the testator, it has become the duty of the executors to pay over to themselves as trustees the funds of this estate? The answer to these questions is not difficult, and requires us to deny the right to the double commissions claimed.

But it is said, the surrogate by judicial decree has discharged the executors and made them trustees. He did not so discharge them, and could not foreclose by an opinion as to the future functions of the executors the question not before him, which is now before us. What he did, contradicts what he said, and shows how impossible it proved to be to separate duties which in their nature under the will were inseparable. On the first accounting of the executors a balance of assets was ascertained by estimating in gross at over five millions the busi-

ness value of the firm of Garner & Co. No settlement of that business conducted by the executors was in any manner had: the executors' account was brought down only to the previous first of January; and to meet obligations of the estate they were told to retain \$50,000 and hold the balance as trustees. This attempted change of capacity at that moment was purely constructive; not warranted by the will; needed for no purpose except as a foundation for double commissions. The decree wound up with an order discharging the executors "except as hereinbefore stated and directed." Since under that exception they were still to account for receipts following the previous first of January, for the disposition of the \$50,000 and for the whole remaining bulk of the estate as yet unconverted into money and undistributed, what is called the discharge amounted to nothing more than a settlement of a part of the executors' accounts. Soon after, they filed what they term a supplemental account, in which they showed that as executors they had paid out, not only the \$50,000 upon debts of the estate, but more than \$183,000 beside; and while theoretically they did not have the money, and the trustees who did have it were not before the court, having filed no petition that we can discover, yet the surrogate did not hesitate to order the trustees to pay to the executors the \$183,000 and all the expenses and allowances of the accounting, and so assumed and recognized that the executors still retained the estate as such, and had it before the court, and subject to its order. The alleged separation did not exist in fact, but was purely formal and constructive, and inconsistent as a theory with the real action taken. No question before the surrogate and no official duty of his gave authority to construe the effect of the will upon the future attitude of the executors. If a question of distribution had been reached, and a separate and distinct trust fund, settled and fixed in amount, had been judicially constituted, and the order obeyed by a separate holding and investment, a very different case would have been presented. For these reasons we are of opinion that double commissions ought not to have been allowed, and the plaintiff had no cause of action.

The judgment of the General and of the Special Terms

should be reversed and judgment ordered for the defendants, dismissing the complaint with costs.

All concur.

Judgment accordingly.

Double Commissions against the policy of the law.—It is plainly the general rule that, where the same person acts as administrator or executor or guardian and also as trustee, he will not ordinarily be allowed compensation in both capacities.

Gibson's Case, 1 Bland's Chan. 188; Blake v. Pegram, 101 Mass. 592; Jones' Case, 4 Sandf. Chan. 616; Holley v. S. G. *et al.*, 4 Ed. Chan. 284; Astor's Estate, 4 Whart. 241; Stevenson's Estate, 1 Parsons' Eq. 19; Miller v. Congdon, 14 Gray, 114; 8 Williams on Exec. 1064, n.; Perry on Trusts, § 918 and note.

In Blake v. Pegram, *supra*, it is said, speaking to this point: "The commission of five per cent. upon income received as guardian, in addition to a like sum charged upon the same money as received in the capacity of trustee, is manifestly excessive. Such a commission upon income received and paid over is allowable only as a convenient measure of compensation for services supposed to have been actually rendered. It implies something more than mere nominal service, and the responsibility of the trust. There is no rule of law and no principle of right by which such commissions are to be charged or allowed without regard to the rendition of actual services therefor. When the same person is both guardian and trustee, it would be a reproach to the law, and to the courts charged with the protection of such trusts, to allow him to charge full commissions in both capacities for the same service."

So, also, when an estate is transferred from one trustee to another, care is to be taken, as far as it is just, not to allow double commissions.

Kellogg's Case, 7 Paige, 267; Hosack v. Rogers, 9 Id. 468; White v. Bullock, 20 Barb. 99; Jones' Case, 4 Sandf. Chan. 616; Valentine v. Valentine, 8 Barb. Chan. 488; Gibson's Case, 1 Bland's Chan. 188.

In Gibson's Case, *supra*, it was held that where a deceased trustee had received full commissions his successor should be allowed no more than a necessary recompense for his trouble. This seeming to involve to some extent a payment of double commissions the Court said: "In some cases the fund may, to a certain extent, be burdened with double commissions, as in this instance, where the trustee dies after having actually received an amount of the proceeds of sale equal to the sum allowed him as commissions upon the whole by a previous order of court. In such a case the court cannot revoke its order merely because of the death of the trustee, and therefore the only mode in which this double charge could be prevented or corrected would be to alter the practice, so as to postpone the

payment of the trustee's commission until the whole of his duties had been performed, or to authorize summary proceedings to be instituted to make his representatives refund in part, with which the succeeding trustee may be compensated for his trouble in collecting the balance. * * * But in this case the fund has already been charged with full commissions, and therefore should not now be again charged with more than a necessary recompense to the present trustee for his trouble, which, in this as in all similar cases, must be regulated according to the service actually rendered."

There can be but one compensation, however numerous the trustees. They must divide it among themselves in some equitable proportion. *Stevenson's Estate*, 1 *Parson's Eq.* 19.

But an executor who, being an attorney at law, has rendered valuable services to the estate in his professional capacity, has been held to be entitled to adequate compensation for such services, in addition to his compensation as executor. *Wendell v. French*, 19 *N. H.* 210. See, also, *Lowrie's Appeal*, 1 *Grant's Cases*, 378; *Elling v. Naglee*, 9 *Cal.* 688. But see *Hough v. Harvey*, 71 *Ill.* 72.

In *Biddle's Appeal*, 88 *Penn. St.* 340, it was held that trustees of real estate, who have had the care of it for many years, although they have been allowed regular commissions upon the income, may justly be allowed a further compensation out of the corpus of the estate on the termination of the trust. In this case the value of the estate exceeded \$200,000, and it had been managed by the trustees for twenty years, on an average commission of about \$200 per annum. Upon a settlement of the accounts of the trustees they were allowed \$2,000 as additional compensation for their long continued and efficient services. In sustaining this extra allowance the Court says: "The pittance received by the appellants as a commission on the rents of this valuable property is no proper compensation for the care and management of it for nineteen years. We think, therefore, that it was error to set aside the adjudication. From the facts as presented the amount fixed by the learned judge appears reasonable."

Ordinarily it is held that while a trustee is entitled to commissions out of the income, the commissions must not encroach in any degree upon the corpus of the estate. *Burney v. Spear*, 17 *Ga.* 225; *Price v. Cults*, 29 *Id.* 142; *Galliday v. Bisset*, 12 *Penn. St.* 347 [compare with this case *Spangler's Appeal*, 21 *Id.* 385]; *Heard v. Eldredge*, 109 *Mass.* 258; *McCauseland's Appeal*, 88 *Penn. St.* 466; *Lutten's Appeal*, 47 *Id.* 356; *Myers' Appeal*, 62 *Id.* 104; see, also, *Fleming v. Wilson*, 6 *Barb.* 610; *Elling v. Naglee*, 9 *Cal.* 688; *Perry on Trusts*, § 919.

VAN STEENWYCK vs. WASHBURN.

[59 Wisconsin, 483.]

ELECTION BY COURT FOR INSANE WIDOW.

A court having jurisdiction of the person and estate of an insane widow, may elect for her between her dower right and a provision in lieu of the same.

ACTION to construe a will.

Finches, Lynde & Miller, for appellants.

Cameron, Losey & Bunn, for respondents.

COLE, C. J. This is a bill filed by the executors praying the court to construe the will of the late Gov. C. C. Washburn, and to direct them as to the manner of executing its trusts. All persons interested in the estate are made parties. The first question, as to which the instruction of the court is asked, is whether Mrs. Washburn, the widow of the testator, being insane, must take under the provisions of the will or against the will. The statute on this subject enacts that if any lands be devised to a woman, or other provision be made for her in the will of her husband; she shall make her election whether she will take the lands so devised, or the provisions so made, or whether she will claim the share of his estate allowed her by law. She is not entitled to both, unless it plainly appears by the will to have been so intended by the testator. (Sec. 2171, R. S.) When the widow shall be entitled to an election, she shall be deemed to have elected to take such devise or other provision, unless, within one year from the death of her husband, she file in the proper probate court a notice in writing that she elects to take the provision made for her by law instead of such devise or other provision. (Sec. 2171.) As was observed in *Hardy v. Scales* (54 Wis. 452), this statute changes the common law rule that a provision for the widow, in the will, was presumed to be a matter of bounty, and not intended

to exclude dower, unless it was so declared in the will, or resulted as a necessary implication from its terms.

The second clause of the will under consideration reads as follows: "I direct my executors to bear constantly in mind the wants of my wife, and to set aside, use, and expend whatever moneys may be necessary, consistently with her condition, to provide for her comfort and physical health; and I place no limit upon the sums which they may spend for the purposes indicated." Now, can this be said to be a "devise" or "other provision" made for the widow, within the meaning of § 2171, above referred to? We are clearly of opinion that an affirmative answer must be given this question.

All the counsel agree that the intention of the testator, as collected from the whole will, must control in the interpretation of any particular clause. Now, observing this cardinal rule of construction, were there any doubt as to the meaning or intent of the second clause—and we do not really perceive how there can be—such doubt would be removed by an examination of the other clauses. But regarding this clause alone, what conclusion can be drawn from the language used? It seems to us we must say and hold that the testator therein and thereby intended to make, and did make, provision for his wife which was to be in lieu of dower and one-third of the personal estate. The provision is to continue for her natural life. It is ample and adequate to meet her every want, to secure for her every comfort and every relief which money can provide, and which her physical health or mental infirmity may require under any possible change in her condition. The executors are imperatively directed *to bear constantly in mind the wants of his wife*; to set aside, use and expend whatever money may be necessary, consistently with her condition, to provide for her comfort and physical health, without limit as to the sums they may spend for these purposes. This is strong and unequivocal language, and excludes all doubt as to the meaning or intent of the testator. We are confident we have not misapprehended it in the remarks which we have made upon this clause.

This conclusion is greatly strengthened by other clauses of

the will, in which the testator carefully directs how his estate is to be managed and disposed of by his executors or the Fidelity Company, his ultimate trustee. Express provision is made for renting the flouring mills at Minneapolis by the executors; for putting them and the pine lands on Black river into a corporation; or, in the event that these properties were not put into a corporation, then for their sale and conveyance; for cutting the timber on the pine lands, manufacturing it into lumber, and selling the same; and for the final distribution of the residue of the estate after all legacies and bequests were paid. These provisions are utterly inconsistent with the idea that the widow was to have dower in the estate, and demonstrate that it was the intention of the testator to make some other provision for her which should be in lieu and satisfaction of all legal rights. And so far from "it plainly appearing by the will" that she should have dower in addition to that provision, the contrary intention is clearly manifest. Counsel referred to cases which hold that after a provision is made for the widow, where lands are devised to trustees upon trusts for any purpose, with power or direction given the trustees to occupy, manage, or lease the same, or even to cut timber on any part of the lands, this mode of disposition is considered inconsistent with a claim of dower and makes an election necessary. *Birmingham v. Kirwan*, 2 Schoales & L. 444; *Misll v. Brain*, 4 Madd. 119; *Butcher v. Kemp*, 5 Madd. 61; *Goodfellow v. Goodfellow*, 18 Beav. 365, are instructive upon this point. We do not deem it necessary to go over these cases, inasmuch as the intention to exclude dower is so perfectly plain and clear on the face of the will.

But the learned counsel who combats this view says the direction to the executors to provide for the comfort and physical health of his wife, created no charge upon the testator's estate; that it was merely a personal direction to them, intended to be in force only during the settlement of the estate, which the testator contemplated would be closed at the end of five years. Some of the duties imposed upon the executors by the will, it was doubtless expected they would fully discharge or perform in five years. But that was not the case in respect to all the

duties intrusted to them by the will. The direction requiring them to constantly bear in mind the wants of his insane wife, and to set aside, use and expend whatever money might be necessary to provide for her comfort and support, created a personal trust which was to continue while she lived. This is apparent from the will. The executors cannot discharge themselves of this important duty—as they can of some others—by transferring that trust to “The Fidelity Insurance, Trust & Safe Deposit Company” of Philadelphia, even if that institution would agree to accept and perform it; for it was a matter of personal trust and confidence reposed in them as trustees by the testator. The will not only provides all the pecuniary means necessary for a full performance of the trust, but it expressly requires the executors to expend whatever may be essential to promote her comfort or meet her wants. To maintain and support such a trust, to enable the executors to perform the duties which it devolves upon them, they have the control of the entire estate, and are required to set aside and retain in their hands a sufficient sum to meet all the possible wants of Mrs. Washburn, of every kind, while she lives. For, as we have said, this is a personal trust confided to them in addition to the ordinary powers and duties of executors. It cannot be doubted that the testator regarded it as the most delicate and important duty intrusted to them under the will; therefore he selected for its performance intimate friends and relatives, persons who would most likely take a lively interest in, and watch with the greatest concern over, the welfare and comfort of his unfortunate wife. It seems hardly necessary to add that the second clause creates a personal trust within the strict sense of the term. (See *Saunderson v. Stearns*, 6 Mass. 37; *Dorr v. Wainwright*, 13 Pick. 328; *Dole v. Johnson*, 3 Allen, 364; *Carson v. Carson*, 6 Allen, 397; *Warner v. Bates*, 98 Mass. 274; *Sawyer's Appeal*, 16 N. H. 459; 2 Story's Eq. Jur. §§ 1058 *et seq.*; 1 Perry on Trusts, § 262; *Batchelder v. Batchelder*, 20 Wis. 453; *Burt v. Herron's Ex'rs*, 66 Pa. St. 400; *In re Sanderson's Trust*, 3 Kay & J. 497; *Thorp v. Owen*, 2 Hare, 608; *Erickson v. Willard*, 1 N. H. 227; *Foley v. Parry*, 1 Cooper's Sel. Cas. 219; s. c. 8

Eng. Cond. Ch. R. 444; *Stewart v. Chambers*, 2 Sandf. Ch. 382.)

But the learned counsel insists that the provision in the second clause cannot come within the statute, because the amount to be expended by the executors for the support of Mrs. Washburn rests solely in their discretion, and that a court will not review such discretion if exercised in good faith. So he says, whether the amount to be spent for the benefit of the widow is \$1,000 or \$5,000 a year, is entirely within the discretion of the executors, and that no person can be put to an election until fully advised of the extent and value of the two rights or things he must choose between. In answer to this position we say there can be no doubt, if the executors neglect or refuse to expend whatever money may be necessary to execute the trust, that a court of equity will compel them to do so. There is surely no such uncertainty as to the requisite amount as to be incapable of legal ascertainment. *Id certum est quod certum reddi potest*. In one sense there is no discretion in the executors or trustees upon the subject. They must expend whatever is necessary for the purposes indicated. The direction is mandatory in the will, leaving no discretion in the executors in that regard. An absolute duty is imposed to expend whatever is necessary, regard being had to the condition and changing circumstances of Mrs. Washburn. At one time a larger expenditure may be called for than at another, but the provision made is ample and adequate to meet every want and secure every comfort. Certainly a court of equity would find no difficulty in enforcing such an absolute trust, should the executors neglect or fail to perform it. This proposition we deem too plain to require further comment.

Thus, having reached the conclusion that the will makes provision for the widow within the true intent and meaning of the statute, the next question to be considered is—Does the statute apply to an insane person? On this point it is vigorously insisted that it does not; that the statute provides only for cases where an election is possible; that an insane widow is incapable of making any election, of exercising any intelligent judgment or choice, therefore she cannot come within its

terms. The statute manifestly implies choice or election on the part of the widow, or by some instrumentality in her behalf. At the same time it is apparent that the statute contains no exception of persons who are insane or otherwise under disability. Where the widow is sane, is *sui juris* capable of making contracts, competent to bind herself by a legal obligation, the way is plain. She can elect whether she will take the devise or other provision made for her in the will of her husband, or whether she will claim that interest in his estate which the law gives her. But when we come to apply the statute to an insane widow, a *non compos mentis*, one who can exercise no intelligent judgment or choice, one who is not responsible for her acts, then it goes against our notions of right and justice. Still, the law is well settled that in the construction of statutes general words are to have a general operation, unless something is found in the statute itself which affords grounds for qualifying or restraining them. "No exceptions can be claimed in favor of particular persons or classes unless they are expressly mentioned." (Dixon, C. J., in *Woodbury v. Shackleford*, 19 Wis. 60.) The same principle was recognized and enforced in *Lindsay v. Fay* (28 Wis. 177), and it is doubtless in accord with the great weight of judicial opinion on this subject. As the Legislature has made no exception in the statute the courts have no right to make one, because to do so would be legislation. Were we to hold that the statute does not include a widow of unsound mind, we should certainly be making an addition to it which the Legislature has not seen fit to enact. The ill effects of holding that the statute did include an insane widow were most ably presented in the arguments of respondents' counsel. These evil consequences, however proper for the consideration of the Legislature, can really have no weight in giving construction to a statute which is plain and unambiguous in its language. The doctrine of an inherent equity, creating an exception as to any disability where the Legislature has made none, must be abandoned, particularly in a country where the legislative power is distinct from the judicial. The result, therefore, on this point, is that we must hold that the general words in the

statute have a general application, and since there is no exception as to an insane widow, the court can create none. (*Demarest v. Wynkoop*, 3 Johns. Ch. 188; *Lewis v. Lewis*, 7 Ired. Law, 73; *Thompson v. Egbert*, 2 Har. (N. J.) 462; *Bank v. Dalton*, 9 How. 522.)

The next inquiry is—How and by whom is the election to be made? The counsel for the executors say the right and duty of making an election are personal to the widow and must be made by her alone. But she is insane, mentally incapable of making a choice or election in the matter. This being the case, can any election be made for her under the statute, or does the power to elect fail on account of her disability? These are questions not free from difficulty, but we think they are susceptible of solution. The counsel for the respondents claim that the guardian of Mrs. Washburn can elect for her, and that the election which he has made to take her legal share in the estate is a valid election, and must stand. At the same time the counsel, with his usual fairness and candor, admits that there are many decisions disaffirming the right of the guardian to elect. This concession is not improvidently made. Many cases can be found which, in effect, hold that the statutory right of election conferred upon the widow is a strictly personal right, and cannot be exercised by another person in her behalf; that even the incapacity of the widow to elect, by reason of insanity, furnishes no sufficient ground for the relaxation of this rule. (*Collins v. Carman*, 5 Md. 503; *Hinton v. Hinton*, 6 Ired. Law, 274; *Lewis v. Lewis*, 7 Id. 73; *Sherman v. Newton*, 6 Gray, 307; 3 Har. & McH. 95; *Welch v. Anderson*, 28 Mo. 293.) We are not aware of any direct authority which decides that the guardian of an insane widow may elect for her, in the absence of a statute giving him that right. In *Brown v. Hodgdon* (31 Me. 65) the widow waived the provision made for her in the will. Subsequently a guardian was appointed, on account of insanity, who claimed dower for her. This was quite consistent with the position that she had made a valid waiver. It was contended that the widow was insane when she made the waiver. But whether she was or not the court did not decide. The court says, in effect, that the con-

tracts of insane persons are not void, but only voidable, and may be ratified during a lucid interval; that nothing had been done by the widow evincing a disposition to avoid the waiver, nor by the guardian after his appointment. It is apparent the case fails to sustain the position to which it is cited, that the guardian may elect. In *Heavenridge v. Nelson* (56 Ind. 90) the court decides that the guardian of a widow of unsound mind has no power to elect for her, as between the provisions of a will and her legal rights. The case is in harmony with the great current of authority. *Pinkerton v. Sargent* (102 Mass. 568) affirms the same doctrine, that the privilege of a waiver is a purely personal right, and if the widow is insane, neither she nor her guardian can exercise it. It seems unnecessary to multiply cases upon this point. Nor do we find anything in the statute relating to the powers and duties of a guardian of an insane person which confers the right to elect.

We cannot go over, in detail, the various provisions referred to by counsel, but content ourselves with saying that in none of them is this right given, either expressly or by any fair implication. The right of the guardian to sue for and collect debts due his ward, and to appear for and represent such ward in all actions and proceedings, except where another person is appointed for the purpose, does not relate to or apply to an election under a will. It properly refers to the proceedings in ordinary actions in court. Still, notwithstanding these provisions of the statute, the appointment of a guardian *ad litem* is generally deemed necessary, and made; but it is clear that the statute confers no power on the guardian to make an election for an insane widow, and it would be a perversion of its terms to so hold.

It therefore follows, from these views, that the election made by the guardian of Mrs. Washburn was without authority of law, and can have no validity whatever. But if neither the widow nor guardian could make a valid election under the statute, the question arises whether a court of equity has the power to make it for her. At common law, where the person entitled to elect was insane and incapable of exercising the right,

a court of equity would elect for him. Says Mr. Justice Story: "It is in cases of wills that the doctrine respecting election and satisfaction must frequently, though not exclusively, arise in practice, and is acted upon and enforced by courts of equity." The learned author defines "election," as used by him, "to be an obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both." (2 Story's Eq. Jur. § 1075.)

Independently of the statute, probably no one would question the power of a court of equity, where the application was in time, to elect for an insane widow, or other person incapable from want of capacity of personally making it. Such a power has often been exercised by courts of chancery in England and in this country, and the jurisdiction is well established. Does, then, the statute which requires the widow to elect, limit or abrogate this jurisdiction, so that a court can no longer exert it on behalf of an insane widow? We perceive no sufficient grounds for saying that it does. The object of the statute is to regulate dower, declare when and under what circumstances it shall exist, define its extent, and prescribe the manner in which it may be barred. True, it provides that when the widow is put to an election, she shall be deemed to have elected to take the jointure, devise, or other provision, unless, within a year from the death of her husband, she file a notice that she elects to take the share of his estate which the law gives her. But we do not think it was the design of the statute to abrogate the jurisdiction of a court of equity in a proper case. Such an inference should not be made without a clear expression of such legislative intent. Besides, within the year, the executors invoked the jurisdiction of the court to construe the will, asking directions as to how they shall execute its trusts, and that

the question of election be determined. In one question they distinctly ask whether the widow, being insane, is put to an election; if so, how and by whom the election is to be made. This calls upon the court to make the election if it has the power to do so.

The question as to the right of a court of equity to make an election for an insane widow has been considered in other States where a similar statute exists. In *Wright v. West* (2 Lea [Tenn.], 78) it was decided that a widow who had not dissented from the provisions of her husband's will within the time prescribed by law, because of her insanity, might in equity assert her rights in the estate as though she had dissented. Judge Freeman dissented from the decision, holding that she was barred by the statute. But the discussion in both opinions is learned and able. In *Smither v. Smither's Ex'r* (9 Bush [Ky.], 230) the court ruled that the widow might make an election in a mode different from that pointed out by statute. The proceeding was in equity, and the election of the widow was postponed until the condition of the estate was ascertained. In *Collins v. Carman* (5 Md. 503) no renunciation by the widow, or by any one in her behalf, was made or attempted to be made during her life, but the provisions of the will for her benefit were fully complied with by the executor. The widow was insane at the death of her husband, and continued so until she died. Shortly after her death letters of administration on her estate were granted to the complainant, who promptly filed a renunciation of the devises and bequests made for the benefit of his intestate. He then filed a bill to obtain a decree declaring his renunciation effectual and sufficient; or if, for any cause, it should be deemed informal and imperfect, he prayed that he might be considered as revoking by his bill the renunciation. The court held that the act requiring the widow to renounce the devises and bequests in the will within six months from the death of the husband, included an insane person, and that her administrator, after a lapse of four years, could not renounce for her, she having enjoyed, during all that time, the benefits provided for her by the will. Therefore the court decided that he could not make the renunciation or claim

anything beyond what was given his intestate in the will. In the opinion the court uses this language: "In saying this, we wish to be understood as not intimating any opinion upon the question whether a court of equity can or cannot make an election or renunciation for an insane widow during her life, and in proper time. The case does not call for a decision on that point." (5 Md. 527.) Therefore, in view of these authorities and of the nature of the case, we are disposed to affirm the right of the court to elect for the widow.

But upon what principles must the court proceed, or what considerations should be regarded in making that election? The counsel for the respondents insist that the principle upon which an election is made by a court for a person under disability, is to take that property which is the most valuable. That may afford a just and proper rule upon which to proceed in most cases. But we think it would not be wise to act upon that principle in the case before us for these reasons: Gov. Washburn, at the time of his death, owned large properties in the States of Wisconsin, Minnesota and Missouri. Had he died intestate it is said his widow would have taken \$600,000 or \$700,000 as her share of his estate. It was assumed on the argument, and such doubtless is the fact, that the executors have set aside \$5,000 a year to be expended for her support. If this amount should be doubled or trebled, it is plain that the sums expended for her benefit would only be a small fraction of the share she would take by law. Mrs. Washburn was sixty-two years of age when this bill was filed. She has been insane, without a lucid interval, for more than twenty-five years. There is no ground for a rational hope or expectation that she will ever be any better. Her mind has rested too long in the deep eclipse to justify or warrant such a hope. Medical science and skill long since exhausted their resources in efforts to cure her. Presumably she is incurably and hopelessly insane; and if she is ever restored to her reason, ever again clothed and in her right mind, to all human judgment that change must be brought about by an agency higher than that of man. She can have no conception of the value or use of money. If "the wealth of Ormus and of Ind" were laid at her feet she would

not distinguish it from the dust. She cannot use money ; she cannot manage it ; its possession would be of no earthly benefit or advantage to her. Provision is made in the will for all her wants and necessities ; for medical care and attendance ; for all other care ; in short, for everything which will promote her comfort and physical health. Does not this meet the demands of every equitable requirement, so far as Mrs. Washburn is concerned ? Further, cannot the court pay some regard to the benevolent intentions of the testator towards his kindred by blood, and those having claims on his bounty ; to his munificent bequests for admirable and noble public charities, such as establishing a public library, an orphan asylum for young and destitute orphans ; to the fact that he made a will in and by which he disposed of his entire estate in a manner which seemed to him just and right ? Is it permissible for the court to consider any of these matters, or must its discretion and judgment be limited to the sole inquiry, which property is the more valuable ? It is evident if the court should elect what the law gives the widow in case of intestacy, that the intentions of the testator will, in a measure, be defeated. Such an election would greatly interfere with the scheme of the will. Defeating a will, in any substantial provision, is much like breaking it. It is defeating it *pro tanto*. The right to dispose of one's estate in accordance with his own wishes is a sacred right, which a court of equity will not disregard or destroy. The late chief-justice, in *Dodge v. Williams* (46 Wis. 70), says : "Every one should have the same power to dispose by will after his death, in accordance with his own wishes, of whatever he may leave behind him in his own sole right, as he had in life to dispose of it by contract or by gift ; and it is as much the duty of courts to uphold and enforce his will after death, as to uphold and enforce his contracts made during life." (46 Wis. 90, 91.)

It seem to us these considerations are entitled to some weight in making the election in this case. If the court can regard them, if it has any discretion in the matter, they should exert their due influence on our judgment. But if the court must elect for the widow the more valuable interest, without

reference to any other consideration, then it really will exercise no discretion. But we think it is the clear duty of the court to exercise a sound discretion in the matter—to consider everything having a legitimate bearing on the election to be made. Consequently, acting upon that principle, the court, in view of Mrs. Washburn's insane condition, in view of the liberal and ample provision made for her benefit in the will, and in consideration of all the facts, does not elect for her that provision as being on the whole the best and most advantageous for her interest and welfare.

But it is said the heirs of Mrs. Washburn are entitled to recognition upon the question of election. An examination of the will shows that the testator has made a most bountiful provision for his two daughters. It is said they will receive under the will about half a million dollars apiece. They have, therefore, no ground to complain; indeed, they do not complain of anything in the will. It is but fair to assume from the record that it is not their wish that any disposition which their kind and affectionate father saw fit to make of his property should fail or not have full effect given to it.

These remarks sufficiently indicate our views on most of the points upon which directions were asked by the executors. Of course, the personal property will be governed by the law of the domicile, so that the election which has been made will dispose of all questions relating to the personal estate and the real estate situated in this State. How this election may or should affect the rights of the widow in real property in other States, is a point upon which we decline to express an opinion, although the executors ask us to decide the question here. But it seems to us that the decision of that question may properly be left to the tribunals of the State where such real estate is situated. There can be no doubt of the correctness of the proposition that the court of the domicile, the one which has jurisdiction of the person and estate of the insane widow, is the one to make an election for her. The court of this State placed the widow under guardianship and appointed a guardian of her person and estate. This court has made an election for

her, but how far such election will affect her rights in real estate situated in another State, may be a grave question. This observation, however, may be made: It is generally agreed by writers on the subject, and the rule has frequently been acted on by the courts, that the interpretation and construction of the will belongs to the tribunal of the domicile of the testator. Mr. Justice Story, in his work on the Conflict of Laws, so states the doctrine (§ 491), as does Judge Redfield (1 Redf. on Wills, 396), and other authorities cited by these learned writers, in notes to their texts. It is also true that the administration in the State of the domicile is deemed the principal or primary administration—the one which can make the final decree for the settlement and distribution of the estate. If administration is granted in another State, it is treated as in its nature ancillary merely, and is generally held subordinate to the principal administration. (See Story's Conf. Laws, § 518; *Price v. Mace*, 47 Wis. 23; *Parsons v. Lyman*, 20 N. Y. 103.) So, where assets remain in the hands of the ancillary administrator after the satisfaction of all debts in his jurisdiction, they are usually ordered to be sent to the principal administrator for distribution. But real estate is governed by the *lex loci*, and questions in respect to it properly belong to the jurisdiction where it is situated. There may be exceptions to this rule, as the counsel for the executors claim. But suffice it to say, we shall not attempt to define the rights of Mrs. Washburn in real estate in other States.

It appears that there is a statute in Minnesota which provides that the surviving wife shall be entitled to, and shall hold in fee simple, an equal undivided one-third of all lands of which her deceased husband was at any time during coverture seized or possessed, free from any testamentary or other disposition thereof to which she shall not have assented in writing, but subject in its just proportion to the payment of debts of the deceased. The respondents' counsel claim that under this statute the widow took, *eo instanti* on the testator's death, an undivided one-third in fee simple, and that this interest in such real estate she now holds, both by descent and by the decree of the Hennepin county Probate Court. It does,

indeed, appear in the case, that the Probate Court of that county made such a decree, from which an appeal was taken, and which is now pending in the Appellate Court. But the construction of this statute, as well as the question as to what effect must be given the election for the widow made by the Probate Court, we shall leave for the decision of the Supreme Court of Minnesota. It may safely be assumed that that able and enlightened tribunal will correctly expound the statute in question, and define the rights of Mrs. Washburn under it and under the decree of the Probate Court. No doubt it will give to the decision of this court in placing a construction upon this will of Gov. Washburn, and in making an election for the widow, all the consideration and credit to which it may be entitled, whether upon principles of comity or under the law of Congress. There we leave the matter.

In closing this opinion we must express our admiration at the eminent ability and great research displayed by counsel on both sides in the argument of the cause.

It follows, from the views expressed, that the judgment of the Circuit Court in construing the provision made in the will for the support of the widow, as well as in the directions to the executors in regard to the executions of their trusts, is erroneous. The judgment is, therefore, reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion. It is also ordered that the taxable costs and disbursements on both sides be paid out of the estate.

LYON, J. I fully concur in the decision of the court on all the questions determined by it, leading to and including the proposition that the court must make the election whether Mrs. Washburn shall take under the will of her late husband, or whether the provision made for her therein be waived in her behalf, and she be left to take the interest in his estate given by the statute in such cases. I also agree that all the probabilities are that Mrs. Washburn will never recover her reason; and further, that the provisions of the will are amply

sufficient to supply all of her wants, and to secure for her the best care and attention during the remainder of her life. Yet I am unable to concur with my brethren in the election made by them that Mrs. Washburn take under the will instead of the statute. I think the court should make that election for her which she, were she sane and capable of exercising reasonable judgment, would make for herself. I cannot doubt, in that event, she would elect to waive the provisions made for her in the will, and take the interest in her late husband's estate which the statute in such case would give her.

I must, therefore, dissent from the judgment of the court, which elects for her that she take under the will.

RICHARDSON vs. RICHARDSON.

[75 Maine, 570.]

TENANT FOR LIFE.—EXTRA DIVIDENDS.

All money dividends, including extra dividends or bonuses payable in cash from the earnings of the corporation, belong to the tenant for life of the stock.

ACTION for a construction of a will.

W. L. Putnam, for executor.

J. & E. M. Rand, Enoch Knight and H. R. Virgin, for T. H. Richardson and others.

PETERS, C. J. This case presents the following facts: Israel Richardson died in March, 1867, leaving a will which contains these provisions: "I give and bequeath to Hannah Richardson, wife of Thomas H. Richardson, of Norway, in the State of Maine, during her natural life, the income or dividends from my stock or shares in the Portland Gas Light Company; and after the decease of said Hannah, I give and bequeath said

income or dividends, during his natural life, to said Thomas H. Richardson ; and from and after the decease of the said Hannah and of said Thomas H. I give and bequeath said income or dividends to the children of said Thomas H. and Hannah, to be paid to them until all of said children shall arrive at the age of twenty-one years ;" the stock then to be divided among the children and their legal representatives. In December, 1879, Thomas was divorced from his wife Hannah, for desertion and other causes. She was afterwards married to Oscar A. Harris. Several children of Thomas and Hannah are now living. All interested parties are before the court by a bill in equity.

On May 1, 1882, the Gas Light Company passed the following vote: "Voted, that, in compliance with the urgent request of the city government, a special dividend be made of the renewal fund of this company, amounting to twenty-five dollars on each share, and that the same be payable, on and after July 2, to stockholders of this date." The testator at his death owned 236 shares, of the par value of \$50 per share. We were informed at the argument that, since this bill was instituted, another dividend of an equal amount with the foregoing has been declared by the company.

Two questions of law are raised upon the foregoing facts. One is this: Is Hannah (Richardson) Harris deprived of the income of the shares because she is no longer Thomas H. Richardson's wife? Clearly not. The bequest to her is dependent upon no condition but her duration of life. The life-estate is given in absolute and unequivocal terms. Naming her as the wife of Thomas H. Richardson was only to make clearer what Hannah Richardson was intended by the will. Nor is there a scintilla of expression from which the idea of trusteeship can be deduced—nothing to show that it was a legacy to her for the benefit of others, either husband or children. In the best view of family exigencies presented to the mind of the testator when his will was signed, he decided to bestow this bounty upon the person who at that time was Thomas H. Richardson's wife—upon Hannah Richardson.

In behalf of the children of Thomas H. and Hannah Richardson, the heirs apparent, these positions are contended

for by their counsel: That dividends, declared by corporations upon their stocks, payable in stock, belong to the capital or corpus; that ordinary and usual money dividends go to the income and belong to the life-tenant; that extraordinary and unusual money dividends go to capital; or, at least, that such a dividend as the one in question goes that way; that the present dividend is peculiar, special and extraordinary; and that it is of the nature of and equivalent to a stock dividend. These propositions have been ably argued by the counsel for the heirs.

The decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances. But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income, belonging to the tenant for life, including not only the usual annual dividend, but all extra dividends or bonuses payable in cash from the earnings of the company. We are satisfied that this can be the only safe, sound, just and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good that can come from it.

And we would entirely reject the qualification of the rule admitted in some instances by some courts, that the life-tenant is not entitled to so much of the dividend as was earned in the life-time of the testator. Too much difficulty and uncertainty would attend the practical operation of such a test. Nor do we appreciate any particular legal or moral merit in it. We think the true rule to be, that, when a dividend upon its stock is declared by a corporation, it belongs to the person holding the stock at the time of the declaration, whether the holder be a life-tenant or remainder-man, without regard to the source from which or the time during which the profits and earnings divided were acquired by the company. (*Goodwin v. Hardy*, 57 Me. 143. See *Jermain v. Lake Shore and Mich. Sou. R. R. Co.* 91 N. Y. 483, and numerous cases in the opinion and arguments.) We speak of a dividend of profits and earnings merely. It has been held that, when a corporation dissolves

and winds up its affairs, and makes to its stockholders a dividend in cash, arising from all its assets, consisting in part of undivided earnings, the entire amount divided would be capital and not income. (*Gifford v. Thompson*, 115 Mass. 478.)

Should it be admitted that a dividend in stock would be regarded as capital, we do not perceive that the position of the heirs would be materially strengthened by the admission. In the case of a stock dividend, the earnings going to create the dividend belong to the stock—are a part of the capital—are strictly not detached from the capital, and, when thus divided, continue to be capital, in a new and more definite form. All undivided profits pass upon every sale or bequest of the stock or shares, as a mere incident or accessory thereto. Stockholders have individually no control or power over undivided profits—cannot transfer or dispose of them or any part of them, until a dividend be declared by a vote of the corporation. In most instances profits may be as valuable to the capital, in the form of funds on hand, as in the form of additional stock. In the case before us, the dividend is payable, not in new capital, not in stock, but in money payable on a certain day. The object of this vote, evidently, was, not to make more stock, but to relieve the stock of the incubus of so great an amount of funds on hand. The presumption is, that the surplus funds were in excess of the business needs of the company. We do not recognize in this dividend anything like a dividend of stock.

It is argued, that the dividend virtually comes from capital, because taken from assets designated by the company as a “renewal fund.” But the directors are the best judges of the expediency of using the fund. They best know whether it is needed or not for such purpose. The vote is their decision that it is not needed by the company, and that it should be distributed to the shareholders. If they can, by their vote, determine when earnings shall be turned into stock, they surely can decide when the dividend may be money. Although the dividend amounts to fifty per cent. on the capital shares, our opinion is that it, and all dividends made, or to be made, like it, must be paid to the life-tenant. If in this she is fortunate

to-day, she may have been exceedingly less so in the past, and no one can anticipate what may come of the morrow. The declaration of this dividend is a confession by the company, that her previous annual income has, from the caution of its officers, been too small, and is now made up to her. The present atones for the past.

An examination of the following authorities, a few of many that might be cited, and of the cases referred to in them, will clearly show the present drift of judicial and professional opinion upon the questions discussed by us; and will show that, by the great bulk of modern cases, since the law upon the subject-matter has emerged from the fluctuations of its evolutionary period, our views as expressed in this discussion are thoroughly sustained. (Bouv. Law Dic. [15th ed.] "Dividends;" 18 Alb. Law Jour. 264; 21 Am. Law Reg. 381; *Price v. Anderson*, 15 Sim. 473; *Bates v. Mackinley*, 31 Beav. 280; *Barton's Trust*, L. R. 5 Eq. 238; *Cogswell v. Cogswell*, 5 Edw. Ch. 231; *Lord v. Brooks*, 52 N. H. 72; *Moss' Appeal*, 83 Penn. St. 264; s. c. 24 Am. Rep. 169, note; *Minot v. Paine*, 99 Mass. 101; *Read v. Head*, 6 Allen, 174; *Rand v. Hubbell*, 115 Mass. 461; also cases *supra*.)

We think it reasonable that the fund arising from the dividend contribute toward the costs and expenses of the litigation. By this proceeding it ascertains its true owner. Before this the ownership was questionable.

Decree accordingly.

DANFORTH, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

See *Vinton's Appeal*, 3 Am. Prob. R. 231; *Hemenway v. Hemenway*, Ib. 429, and cases in note on page 436; *Biddle's Appeal*, Ib. 442; *Brinley v. Grou*, *supra*, p. 324.

DODGE'S APPEAL.

[106 Pennsylvania State, 216.]

WIDOW NOT "HEIR" OF HUSBAND.

A widow cannot take under a devise to her husband's "heirs."

ACCOUNTING of trustees under a will.

George Junkin, for appellants.

Carson, Redding and Jones, for appellee.

STERRETT, J. This contention hinges on the construction of the hereinafter quoted clause in the will of Mrs. Letitia G. Ryan, who died, leaving her husband, a son and two daughters surviving her. The testatrix devised certain real estate to her brother, Samuel White, in trust to permit her husband to occupy or rent the same, "and to receive, take, hold and enjoy the rents, issues, profits and income thereof to his own use absolutely," during life; and, after his decease, "one-third of the aforesaid rents, issues, profits and income to be paid to Caroline E. Dodge, one-third to be paid to Sarah Virginia Blake, and the remaining third to be paid to Edward W. Ryan, for the term of their natural lives, respectively, and from and after their decease to vest absolutely in their heirs forever."

The passive trust in favor of testatrix's husband having terminated at his decease, the active trust for the benefit of her son and daughters commenced and continued until the death of her son, Edward W. Ryan, who died in January, 1883, intestate and without issue, leaving a wife, Amelia Ryan, the appellee, surviving him. Letters of administration on his estate were granted to her in the State of Oregon, and, as such administratrix, she received the arrears of income due her husband up to the date of his decease. She then claimed, as his heir, under the clause of the will above quoted, one-third of the income since accrued, and, from the decree in her favor, this appeal was taken by her sisters-in-law.

The devise to the trustee was coupled with a qualified power of sale, which was never executed; but the land devised was sold on a mortgage, the lien of which antedated the title of testatrix. After payment of the mortgage debt out of the proceeds of sale, the residue was paid to the trustee, and thus became the *corpus* of the trust from which the income for distribution was realized. In view of the facts, it cannot be doubted that the fund represents real estate, and hence it must be distributed accordingly.

The question thus presented by the record is, whether, under Mrs. Ryan's will, the portion in which her son Edward had a beneficial interest, during life, now goes to his widow or to his sisters. In other words, is the widow the "heir" of her husband, or are the appellants his "heirs," according to the true intent and meaning of the will? If the fund for distribution were personalty the widow would perhaps be entitled to participate therein; but inasmuch as it bears the impress of realty, the one-third in which Edward had an equitable life-interest was given by his mother's will to his "heirs forever." In the devise over of the remainder in fee, to take effect immediately upon the expiration of the equitable life-interests respectively, the testatrix used the technical word "heirs," which, in a will, is to be understood in its legal or technical, and not in its popular sense, unless the contrary intent is so plainly apparent that it cannot be misunderstood. (*Porter's Appeal*, 9 Wright, 201; *Eby's Appeal*, 14 Id. 311; *Tillman v. Davis et al.* 95 N. Y. 17.) No such intent is even suggested by the phraseology of the will in this case. There is nothing in the language of the testatrix to warrant the belief that she intended to use the word "heirs" in any other than its well settled legal signification, meaning those who, upon Edward's decease intestate, would take immediately from him an heritable estate. The heirs of a decedent are those of his kindred upon whom the law, immediately upon his decease, casts the estate in real property, and the estate, so descending to the heir, is called the inheritance. (2 Minor's Inst. 452; 2 Bl. Com. 201.) It is conceded that at common law neither the husband nor the wife could be heir to the other; and, while our Intestate Act has

made some changes in the interest to which a widow is entitled in the estate of her deceased husband, she is not in any proper sense of the word recognized as his heir, except, perhaps, in the case of his dying without "known heirs or kindred competent" to take, in which event alone an estate of inheritance is vested in the widow under the tenth section of the Act. In all other contingencies her interest in her husband's estate is unlike that of an heir. While she acquires an interest or estate in the land, and not a mere lien thereon, that interest is of a special and peculiar nature, essentially different from the estate of inheritance which the law casts upon the heir.

For reasons thus briefly suggested, we think the conclusions of the learned president of the Orphans' Court, sitting as auditing judge, are correct: that under his mother's will, Edward W. Ryan had merely an equitable life-interest, and immediately upon his decease the remainder in fee passed absolutely to his "heirs," who, according to the true intent and meaning of the will, are his two surviving sisters.

The decree of the Orphans' Court is reversed at the costs of the appellee; and it is now considered and adjudged that the decree of the auditing judge be affirmed.

See Ivins' Appeal, *supra*, p. 176.

GAY vs. GAY.

[60 Iowa, 415.]

REVOCATION BY CANCELING SIGNATURE.

Drawing scrolls through a signature to a will is not a revocation under a statute requiring that the will be destroyed or canceled in the presence of witnesses in the same manner as the making of a new will.

PROCEEDING to set aside the probate of a will.

Bois & Couch and *Nichols & Burnham*, for appellant.

Hubbard, Clarke & Dawley, for appellee.

DAY, J. Harvey D. Gay died in July, 1878. Some time after his death, his widow, Virginia Gay, discovered a package of papers in the secretary in the back parlor. Soon thereafter she gave the papers to Mr. Hawkins, the administrator of the estate. About the last of August, 1880, the administrator, in looking over these papers, which consisted chiefly of canceled mortgages, found the paper in question, purporting to be the last will of Harvey D. Gay. When found, two scrolls were drawn with a pen lengthwise along the signature, but not in such manner as to obliterate it or render it illegible. The will was then filed in the office of the clerk of the Circuit Court for the purpose of probating it. Some time thereafter the deputy clerk, in unfolding the will, tore the right hand margin to the depth of one-eighth or one-fourth of an inch. This tear communicated with and opened a cut just over the signature, about two or three inches in length. When this cut was made does not satisfactorily appear, but the evidence shows that it was not made entirely through the paper, and that it was not visible until it was opened by the deputy clerk.

The determination of the question involved will be greatly facilitated by considering the state of the law upon the subject prior to the adoption of the statute under which the question arises. By the 6th section of the Statute of Frauds (29 Car. II, ch. 3) it is provided that the revocation of a will by

injury to the instrument itself can be effected only "by burning, canceling, tearing or obliterating the same by the testator himself, or in his presence, and by his direction and consent." Under this statute it was held that to constitute a revocation of a will by burning, there must, at least, be a burning of a part of the paper on which the will is (*Doe & Reed v. Harris*, 8 Ad. & E. 1), and that a very slight act of tearing and burning is sufficient to effect a revocation, if done with such intention (*Bibb & Mole v. Thomas*, 2 W. Bl. 1043); that when a pencil instead of a pen is used for cancellation, the revocation is not necessarily ineffectual, and it may be shown that it was intended to be final (*Mence v. Mence*, 18 Ves. 348; *Frances v. Grover*, 5 Hare, 39), and that, in order to constitute a revocation by obliteration, it is not essential that every word shall be obliterated, the revocation being complete if enough of the material part be expunged to show an intention that the devise shall not stand, as where the testator draws his pen across the devisee's name. (*Mence v. Mence*, 18 Ves. 350; 1 Jarman on Wills, 129-135.) The act (1 Vict. ch. 26) provides that the revocation of a will by injury to the instrument itself, shall be only "by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." This statute, it is to be observed, omits the words *canceling or obliterating*, found in the Statute of Frauds, and substitutes therefor the words *otherwise destroying*. Under this statute it has been held that the words "otherwise destroying" are to be taken to mean a destruction *ejusdem generis* with the modes before mentioned, that is, destruction, in the proper sense of the word, of the substance or contents of the will, or, at least, complete effacement of the writing, as by pasting over it a blank paper (*Re Horsford*, L. R. 3 P. & D. 211); and not a destroying in a secondary sense, as by canceling or incomplete obliteration (*Stephens v. Taprell*, 2 Curt. 458; *Hobbs v. Knight*, 1 Curt. 779); that cancellation and obliteration, unless they prevent the words, as originally written, from being apparent by looking at the will itself, are plainly excluded by the statute (*Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 Jur. 1114), and that glasses may be

used for discovering what the words obliterated originally were. (1 Jarman on Wills, 142, and cases cited.) Chapter 162 of the Revised Statute of the Territory of Iowa, section 9, respecting the revocation of a will by injury to the instrument itself, provides that "no will, nor any part thereof, shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction." This, it will be observed, is identical with the statute. (29 Car. II, ch. 3.) In the Code of 1851, the provisions of our present statute were adopted, as follows: "Section 1288. Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. Section 1289. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will." (Revision §§ 2320, 2321; Code of 1873, §§ 2329 and 2330.)

When a statute provides the manner in which a will may be revoked, that manner must be pursued. (*Wright v. Wright*, 5 Ind. 391; *Runkle v. Gates*, 11 Ind. 95; *Blanchard v. Blanchard*, 32 Vt. 62; *Gains v. Gains*, 2 A. K. Marshall, 190; *Clingan v. Mitcheltree*, 2 Pa. St. 25; *Doe & Reed v. Harris*, 6 Ad. & Ellis, 209.) Our statute provides that a will may be revoked, in whole or in part: *First*. By being destroyed. *Second*. By being canceled, the cancellation being witnessed in the same manner as the making of a new will. If the scroll drawn over the name of the testator had entirely obliterated the signature, this might have worked a destruction of the will, upon the ground that it had destroyed that without which the will could not exist. (See *Hobbs v. Knight*, 1 Curt. Ecc. Rep. 768; *Price v. Powell*, 3 H. & N. 341; *The Goods of Harris*, 3 Sw. & Tr. 485; *Goods of Gullan*, 1 Sw. & Tr. 23; *Goods of Coleman*, 2 Sw. & Tr. 314.) In this case, however, the scrolls drawn across the signature of the testator do not obliterate it, nor render it illegible. They do not, therefore, constitute a destruction of the will. (See *Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 Jur. 1114; *Re Brewster*, 6 Jur. N. S. 56; *Lushington v. Onslow*, 12 Jur. 465; *Stephens v. Laprell*, 2 Curt. 458; *Re*

Beavan, 2 Curt. 369 ; *Re Ibbitson*, 2 Curt. 337 ; *In the Goods of Horsford*, L. R. 3 P. & D. 211.)

It is insisted by the appellant that, as the statute provides for the partial revocation of a will by its being destroyed, the word destroyed cannot mean annihilated, but is sufficiently answered by what was done in this case. It is apparent, however, that there may be a destruction of a particular part of a will by erasure or complete obliteration, and that, admitting that *destroyed* does not, as used in the statute, mean *annihilated*, it does not follow that a will may be destroyed by simply drawing a scroll through the signature. The most that can be said for what was done in the present case is, that it constitutes a cancellation of the signature not rendering it illegible, and, as it was not witnessed in the manner required by section 2330 of the Code, it is inoperative. The court did not err in directing a verdict for the defendant.

The plaintiff introduced as a witness one Paul Carrel, and offered to prove by him that, in the early part of 1878, decedent had a conversation with the witness, in which he went over the question of his property, and in his conversation, referring to the terms of what he claimed to have been his will, said that he had destroyed it, that the law would make a proper distribution of his property to suit him, and that his wife would now get, under the law, what she would have got under the old will, and that he had destroyed his will and should not make another. The plaintiff, also, introduced one Kenedy, and offered to prove by him that he had a conversation with Mr. Gay, about two weeks prior to his death, with reference to the disposition of his property, in which he said that he had destroyed his will ; that he had made a will at one time, but had since destroyed it ; that at the time he made his will he desired his wife to have all the property he had ; that since that time his property had more than doubled, and that now, if he should die, his wife would get as much as she would at the time he made his will, if she had got it all ; that he did not propose to go back on his mother ; that he ought to do something for her, and that he had destroyed his will and should not make another. The defendant objected to this testimony and the objection was sus-

or by will at her decease, that she had in any other estate which was her lawful property.

The bill alleges "that said will was intended by the testatrix to defeat the decision of the court, before mentioned; that the testatrix had no personal acquaintance with Lucy Stone or Susan B. Anthony; that said gift was intended as a gift *in perpetuum* to the said cause." But if Mrs. Eddy has complied with the rules of law in the disposition of her property, even if she has hoped thereby to attain the same object as that desired by her father, the decision referred to is not defeated, but is recognized and conformed to; and, whatever her intention may have been, her bequest is to be upheld.

Her gift to her beneficiaries is absolute in terms. They may do what they will with the property bequeathed to them, as they may with any other property which is lawfully their own. It is true that the gift is accompanied by a request that they will use the fund bequeathed "to further what is called the Woman's Rights Cause." A request made by one who has the right to direct is often, perhaps generally, interpreted as a command. For this reason, recommendatory or precatory words used in a bequest are frequently treated as an express direction. Thus if a legacy were given to A. with a request that out of the sum bequeathed he should pay to another a certain sum, or a portion thereof, it might well be construed as a legacy, to the amount named, to such person. The expression of the desire of the testator would be the expression of his will, and the words in form recommendatory would be held to be mandatory and imperative. Where such words are used, it is therefore a question of the fair construction to be attributed to them. (*Whipple v. Adams*, 1 Met. 444; *Warner v. Bates*, 98 Mass. 274; *Spooner v. Lovejoy*, 108 Mass. 529.)

But the testatrix in the case at bar has left nothing to construction. Apparently aware that a bequest, where she had a right to direct, might be treated as a command, and desirous to make it entirely clear that no restraint of duty in any legal sense was imposed upon her legatees, and that the request of the will was such in the limited sense of the word only, and in no respect mandatory, she adds thereto, referring to the lega-

tees, "But neither of them is under any legal responsibility to any one or to any court to do so." Each of the legatees is, therefore, the sole judge of whether she will follow, or how far or in what way she will follow, the suggestion of the testatrix in the disposition of the estate absolutely bequeathed to her. It is a matter in which she is to be guided only by her judgment and conscience, and no trust is imposed upon the property she receives.

As no trust is created, it would be superfluous to consider whether, if the request of the testatrix were treated as a command, one would then be indicated capable of enforcement according to the rules of law.

Bill dismissed.

Bequests for public purposes not charitable.—In the case of *Jackson v. Phillips* (96 Mass. 539, 542) it appears that one Francis Jackson, by his last will, bequeathed five thousand dollars to certain trustees to be expended by them as they saw fit to further the cause of woman suffrage. The purpose of the bequest is explained in the concluding words of the testator in the will, viz.: "My desire is that they" (the trustees) "may become a permanent organization until the rights of women shall be established equal with those of men."

This bequest the court declared void. In the opinion Mr. Justice Gray said: "It is quite clear that the bequest in trust to be expended 'to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men,' cannot be sustained as a charity. No precedent has been cited in its support. This bequest differs from the others in aiming strictly and exclusively to change the laws; and its object cannot be accomplished without changing the Constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. The bequest therefore, not being for a charitable purpose, nor for the benefit of any particular persons, and being unrestricted in point of time, is inoperative and void." (*Jackson v. Phillips*, 96 Mass. 539, 571.)

But in many instances gifts of money by will have been upheld, when

the object held charitable was apparently hardly more definite and certain than in the case from which Judge Gray's opinion is taken, as for example, to found a society for the encouragement of female servants (*Reeve v. Attorney-General*, 8 Hare, 191); for the benefit and advantage of Great Britain (*Nightingale v. Goalburn*, 5 Hare, 484); for the good of the country and parish (*Attorney-General v. Lonsdale*, 1 Sim. 105); to provide for a literary man, preferably not less than forty years of age (*Thompson v. Thompson*, 1 Colly. R. 381); to have prepared and published essays on statistics (1 Colly. R. 392, 399); to care for shade trees (*Cresson's Appeal*, 30 Penn. St. 437). But a bequest "towards the political restoration of the Jews to Jerusalem and to their own land," has been held void as tending to create a political revolution in a friendly country. (*Habershon v. Var-don*, 4 De Gex & Sm. 467.) And so, a perpetual trust for the purchase and distribution in Great Britain and its dominions of such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind, was likewise held void. (*Brown v. Yeall*, 7 Ves. 50.) While bequests "for the cause of peace," and "to illustrate the inconsistency of war with Christianity, to show its baneful influence on all the great interests of mankind, and to devise means for insuring permanent and universal peace" (*Tappan v. Deblois*, 45 Me. 122); and "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit," have been sustained. (*Whicker v. Hume*, 7 H. L. Cases, 124, 155. See, also, *President of the United States v. Drummond*, there cited; *McDonough v. Murdock*, 15 How. 405, 414; *Attorney-General v. Guise*, 2 Vern. 160; *Attorney-General v. Baliol College*, 9 Mod. 407; *Attorney-General v. Glasgow College*, 2 Colly. R. 665; s. c. 1 H. L. Cases, 800.

NEW ENGLAND TRUST COMPANY vs. EATON.

[8 Eastern Reporter, 495. Supreme Court of Massachusetts, January, 1886.]

BONDS PURCHASED BY TRUSTEE AT PREMIUM.—INCOME AND CAPITAL.—LIFE-TENANT.—REMAINDERMAN.

The gain or loss arising from the sale of stock held in trust is that of the capital of the estate, and the sum received constitutes a new principal.

A trustee who has invested in bonds at a premium may retain annually from the income payable to a life-tenant such sums as will restore to the fund at its maturity what was taken therefrom at the time of purchase.

THE opinion states the case.

J. L. Stackpole, for appellant.

J. H. Benton, Jr., for appellee.

DEVENS, J. This is an appeal from a decree affirming a decree of the probate court, by which the account of the New England Trust Company, a trustee holding a fund, the income of which was payable to a tenant for life, with remainder over, was disallowed. The system which had been pursued by the trustees, with reference to the investments which they had made in bonds and other promises to pay of the United States government, or of municipal or railroad corporations, due on a day certain, for which premiums had been paid, was to ascertain, by tables in use among bankers and brokers, what was in fact the net income arising from these promises, considering the premium actually paid by the investing trustee, which would not be repaid at the maturity of the bond, the rate of interest, the date of payment of the security, and to pay over this net income to the life-tenant, the difference between this net income and the actual rate of interest as received, going to a fund which at the date of the maturity of the promise would leave the original capital in tact. The decree appealed from directed the trustee to pay to the life-tenant, as income, the sums thus reserved for the purpose of being returned to capital.

Whether the question presented may be heard and adjudicated by the probate court and thus by this court, on appeal, has been doubted. The New England Trust Company is a testamentary trustee, compelled by statute to render its accounts, at least once a year, to the probate court, of the hearing on which the fullest notice must be given, and the question is one immediately connected with the administration of the trust. The probate court has full power to see and provide that every interest shall be fully represented, and it is to be observed that this court has also, concurrently with the supreme judicial court, full jurisdiction to hear and determine

in equity all matters in relation to trusts created by will. (Pub. Stat. chaps. 141, 142, 143.) It had the right to determine whether, upon the account rendered by the trustee, it was its duty to account for the sums it had set aside as a part of the capital of the estate or as its income, and to hold or pay them over accordingly.

Without discussing those cases in which it has been held that, in settling the accounts of the executors of a will, the relative rights of legatees under a will, and other questions arising under the will in reference thereto, cannot be decided, all of which are not, perhaps, fully reconcilable, they do not affect the question of jurisdiction here involved. (*Granger v. Bassett*, 98 Mass. 462; *Cowdin v. Perry*, 11 Pick. 512; *Burbank v. Whitney*, 24 Id. 151, first paragraph.) Even if we should hold that it was intended that in the administration of an estate the probate court should not pass upon the difficult questions of construction often arising out of wills, but should determine simply the amount of property subject to distribution, it could not affect the present inquiry. The specific object of requiring trustees to render annual accounts is to ascertain whether the trustee has properly dealt with the trust property. In such a case as the one at bar, the trustee necessarily includes in his account the payments he has made, and describes the investments in which he holds the trust property. If he has paid over to the tenant for life that to which the tenant was not entitled, he should not be allowed therefor, and if, on the other hand, he has transferred to the *corpus* of the fund that which he should not, this should be corrected. Upon the hearing in the probate court and in this court upon the account of trustees, questions similar to the principal one in the case at bar, have heretofore been determined. In *Harvard College v. Amory* (9 Pick. 446) it was determined whether a sum received by the trustees of an estate was rightfully paid to the widow of a testator, instead of being reinvested by the trustees as a part of the capital of the trust funds. In *Heard v. Eldredge* (109 Mass. 253; s. c. 12 Am. Rep. 687), upon the appeal by the life-tenant from the decree of the probate court allowing an account by which a certain sum was treated as capital and not as

the income of a trust fund, the decree of the probate court was affirmed. To the same effect are *Bowker v. Pierce*, 130 Mass. 232; *Dodd v. Winship*, 133 Id. 359. The case of *Wright v. White* (136 Id. 470) is not inconsistent with the view that upon the settlement of an account of the trustee, it may be determined whether a sum of money should be treated as the capital or the income of a trust fund. The decree upon such an account deals only with what has been done in the past, although a decree allowing an account of what has been done may afford a guide in ascertaining what will be allowed in the future. All that is said on this subject in *Wright v. White* (*ubi supra*), is that in a decree allowing an account, a direction as to the mode in which a trustee should thereafter manage the trust fund was not properly a part of the decree allowing an account, and was to be stricken out.

We proceed, then, to consider whether the course pursued by the trustee was correct, and thus whether the account of what he has done is to be allowed. It is the general rule that where investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such investment is that of the *corpus* of the estate. If for any cause it be reduced in value, and it becomes necessary to sell it, the sum for which it is sold becomes a new principal, on which the life-tenant is to receive the income. In the management of real estate, when permanent improvements are placed thereon, these are a proper charge on the capital, while usual and ordinary repairs when made are a deduction from the income. (*Parsons v. Winslow*, 16 Mass. 361.)

If a trustee purchases shares in the capital stock of a bank, inasmuch as the remainderman will receive exactly that which is purchased, the tenant for life should receive the full income thereof undiminished. Such was the course pursued by the trustee in the case at bar in regard to the bank shares purchased by it; nor does it become the duty of the trustee to sell such shares should they appreciate in value, after he has invested in them, and pay over to the tenant for life the amount which they have increased in value. If it becomes necessary to sell such shares, in the proper administration of the trust es-

tate, the gain or loss is that of the capital of the estate, and the sum received constitutes a new principal.

The tenant for life does not seek any order by which the bonds, the interest on which is here under discussion, are to be sold or the investment changed ; nor can it be contended that these securities are not of a class in which the trustees may invest, if due care has been used in the selection. The rule "that no investment can be considered safe or can be approved by a probate court or a court of equity, except in public securities, however well supported by authorities," says Chief-Justice Shaw, "as a rule well established in English courts of equity, is wholly inapplicable and untenable in this country." (*Lovell v. Minot*, 20 Pick. 116.)

While there are now many more public securities than those which existed when this remark was made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation as collateral security, if proper security is taken against fluctuations, is not necessarily injudicious. (*Brown v. French*, 125 Mass. 410 ; s. c. 28 Am. Rep. 254.) There are many stocks under public supervision, bonds of corporations where there is sufficient capital to insure their safety, which with bonds of municipalities, loans secured by mortgage, &c., constitute proper investments. The purchase of the bonds by the trustee appears to have been judiciously made, substantially all have appreciated in value, and they are of the class of securities contemplated as investments by the statute under which the trustee does its business. (Stat. 1869, chap. 182, § 5 ; Stat. 1871, chap. 142 ; Pub. Stat. chap. 116, § 20.)

Assuming that the purchase of bonds even at a premium was safe, prudent and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises, inasmuch as it is certain that the *corpus* of the fund is to be diminished if this investment is permanent, whether the trustee may retain such sums annually as will restore to the fund, at its maturity, exactly what was taken therefrom at the time of the purchase. This

is what the trustee has undertaken to do. If, as suggested in argument, there is any inaccuracy in the calculation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting, should it be required, not necessary now to be discussed. That which is really income from a bond purchased at a price above par, say 120, and payable in ten years, is not the amount received in interest annually, but that amount deducting therefrom the sum necessary to restore at the end of the ten years the \$20 premium. No prudent man would treat as income from his property the whole amount received when there was thus to be a diminution of his principal amounting at the end of the ten years to this premium and steadily tending to this during the entire period. To deal with interest thus received as income purely, would, to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainderman is entitled to have repaid if he is entitled to receive the capital intact. If in such a case the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored, it is not easy to see how investments in bonds bearing a premium can be made in justice to the remainderman, whose property (where a bond is kept to maturity) is diminished solely for the benefit of the tenant for life. Into the question how much income an investment at a premium in a bond payable at a fixed future time produces, the loss of the premium at that time necessarily enters as a factor. The bonds purchased by the trustee have substantially all appreciated in value, and this to such an extent that, if they were now sold, the surplus beyond the sum which would be necessary to restore to the capital all that was paid at the time of purchase by way of premium, would enable the trustee to pay the tenant for life the deductions that have heretofore been made, in order to repair the principal at the maturity of the bond. The life-tenant, therefore, insists that the trustee should now be ordered to pay her these sums, as, if a sale were made at this moment, they would not be needed to repair any deficiency in

the principal. The trustee is to manage the fund in his hands, not for the purpose of speculation, "but in regard to the permanent disposition of the fund." (*Harvard College v. Amory*, 9 Pick. 461; *Lovell v. Minot*, 20 Id. 116.) The argument of the tenant for life, that the practice of holding securities until their maturity would deprive him of the "very care and ability in the management of the trust for which he pays compensation to the trustee," can readily be pressed so far as to sanction a practice of trading and trafficking in trust securities which would be attended with dangerous results to the trust fund. Investments carefully and judiciously made, are not, as a general rule, to be disturbed. The argument of the tenant asserts that the income obtained for the tenant is less than one-half of that which might be obtained on absolutely safe mortgages. The case affords no evidence of this, nor in this proceeding, which only concerns the account of the trustee, and the amount of his payments to the tenant, could it be settled whether, in this view, the trustee should be ordered to dispose of the securities.

But, if the securities were sold and a larger sum realized than would be necessary to restore to the *corpus* of the estate that which was taken from it when they were purchased, the question would still be, whether the appreciation of the securities in market value was the property of the tenant for life or of the remainderman. There is no ground on which it can be contended to belong to the tenant for life, unless he is also to be made responsible when loss occurs in the purchase and subsequent sale of securities. There cannot be this chance of profit for him unless there is to be a corresponding risk on such transactions. If the rule that when a security is kept to maturity, income is to be paid only to such an extent as shall leave the *corpus* of the estate at that time intact, by restoring to it the premium paid at the time of the purchase, be just, it is equally just that the gain or loss that occurs by a sale thereof, if for any cause one shall become necessary, while it is running, should be that of the *corpus* of the fund. The estate of the tenant for life will be unaffected thereby, except so far as it may be altered when a change is made in securities by the

increase or diminution of the sum to be reinvested. To expose the estate of the tenant for life to any risk beyond what is involved in this, and because there may be a possible chance for gain, under some circumstances, by changes in investments to subject it to the loss which occurs when for any cause it becomes necessary to sell at a diminished price securities purchased for the trust estate, would be to defeat the object for which tenancies for life are in most cases created. In *Parsons v. Winslow (ubi supra)* there had been a loss to the trust estate by the defalcation of the trustee, whose successor had been able to recover from him in value only a portion of the property originally intrusted to him, it was held that the diminished fund thus recovered would constitute a new principal, and that the loss would thus "be apportioned in the same manner as if it had arisen from the fall in the price or value of any public stocks, or of any land in which the fund should have been invested according to the provisions of the will." It is said by Mr. Justice Jackson: "It would be unjust and contrary to the manifest intent of the testator, if the tenant for life on the one hand should continue to receive the whole amount of the interest on the original fund after the principal had been thus reduced; or if, on the other hand, the income should be applied to replace the principal. In the one case, the tenant for life would be left for an indefinite period without any support or benefit from the intended bounty of the testator; and, in the other, the reversioner might lose the whole that was intended for him."

It has been suggested that a suspense account might be kept by the trustee, to which sums such as have in the case at bar been retained, might be carried, and if hereafter the bonds should be sold before maturity at an advance, the life-tenant would be entitled to receive therefrom all that was not required to restore the capital originally invested. This suggestion is based upon the theory that any possible profit made by the sale of securities belongs to the tenant for life, and still involves the idea that he must bear the possible loss. We cannot concede this except so far as his estate is affected by the increase or diminution of the sum to be re-

invested. Such a suggestion would require as a corresponding duty that when a bond was depreciating in value there should be retained from the life-tenant's income such sums as would be necessary to repair the loss to the capital of the estate by such depreciation, should it be sold before maturity.

There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par and is payable at the termination of a fixed term, deducting from such interest, as it becomes due, such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should have been made, it has been because a change in the rates of interest or some similar cause has altered market values. There would be no reason to suppose that such a bond could be sold at the amount received, reinvested at any higher rate of interest, unless at the sacrifice of some safeguard in the investment. The investment of trust property should be made with a view of permanency and not in any spirit of speculation, nor should changes be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous re-investment in contemplation. In making such changes the trustees are not entitled so to exercise their authority as to vary or affect the relative rights of the *cestuis que trust*. (Hill's Trustees, 483.)

The only case in this country which we have found, or to which we have been referred, deciding the question we have considered, is *Farwell v. Tweddle* (10 Abb. N. C. 94), in which it was held that a course similar to that pursued by the trustee in this case was correct and proper.

Not much assistance was to be expected from the English cases, as, until 22 and 23 Vict. chap. 35, § 32, authorizing investments in East India stock, and bank stock, on one security, the three per cent. consols was there recognized as proper for trust estates. An investment in the three per cents., which it is not contemplated will ever be paid, and the holders of which

have been considered as perpetual annuitants, has been deemed the only safe investment and peculiarly adapted for the purpose, as until a recent period they have been below par. The principal is well established by all the English cases, that the *corpus* of the trust capital is to be kept intact so that the remainderman may thus receive it, while in justice to the life-tenant it must be kept in income producing property. Where the testator makes a general gift of his estate to, or in trust for, a person for life, with remainder over, so much of the property as consists of leasehold terminable annuities or other interests of a perishable nature must be converted and invested in these permanent securities. As they are permanent, whether purchased above or below par, the life-tenant receives the full income, the remainderman receives undiminished that which has been purchased, and no adjustment of the relative rights of the *cestuis que trust* has been necessary. It is contemplated that there may be specific gifts of terminable or perishable securities which shall show an intention on the part of the testator that the life-tenant may exhaust or consume them, in which case reinvestment would not be required, nor indeed proper. In the absence of these, if in contravention of the general rule, the trustees suffer the tenant for life to receive the whole income arising from such securities, he will be decreed to refund what he may have received over and above what he would have received if the conversion had been duly made and the proceeds invested in the three per cents. This difference is treated as capital invested [for the benefit of all parties entitled, and the tenant for life is bound to make it good in the first instance. On his failure the trustees are responsible therefor. (Hill's Trustees, 386, and cases cited, and Perry's Trusts, § 547.)

The same principles have been applied since investments of trust funds were by the statute of 22 and 23 Vict. chap. 35, permitted to be made in East India stocks, which is a security that may be redeemed, as well as certain other stocks named. The courts have constantly refused to allow any investments to be made therein, unless there were peculiar reasons for favoring the life-tenant, or at the request and on the application of the

settler of the trust. (*Eq. Rev. Int. Soc. v. Fuller*, 1 J. & H. 379; *Hemenway v. Hemenway*, 134 Mass. 446.) In such cases the direction has sometimes been that the investment should not be made unless the stock could be purchased at par. (*Waite v. Littlewood*, 41 L. J. [N. S.] Ch. 636.) One reason given in *Cockburn v. Peel* (3 DeG., F. & J. 170) for refusing to permit a purchase of East India stock, was that it must be purchased at an advance, and that there was no provision in the act for any sinking fund by which the deficiency made in the capital could be supplied.

In *Hume v. Richardson* (4 DeG., F. & J. 29) it was held that for the period between the death of the testator and the passing of the statute 22 and 23 Vict., the life-tenant was entitled only to such income as she would have received had the stock been converted and invested in consols; and that, although after the passage of this statute, she was entitled to the whole income, yet the trustees were only justifiable in keeping the East India stock until a suitable investment could be made in lands in which, by the will, the trustees were directed to invest.

Brown v. Gellatly (L. R. 2 Ch. App. 751) decides no more on this subject than that, when the testator authorizes investments as permanent, which would otherwise be unauthorized, the life-tenant has the full income. This authority given by the will indicated a preference of the life-tenant to this extent, which took the case out of the ordinary rule. "I understand," says the chancellor, "the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than the court would have approved of, and the court has merely to follow his directions and treat the income accordingly as by the income of authorized securities." Other securities not coming within this class were ordered by the chancellor to be converted as soon as possible, and until this could be done the life-tenant would be entitled thereon "to the dividends on so much three per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

The method in which the English courts deal with lease-

hold estates, a common species of terminable security not known in the same form in the United States, when they are settled in trust for life, with remainders over, under such circumstances that the settler must have regarded them as continuing interests for all the beneficiaries of the trust, including the remainderman, is strictly analogous to that which the trustee in the case at bar has pursued. These estates, which are terminable on a life or lives, or at the end of fixed terms, are renewable, sometimes by express contract and sometimes by custom, which has been recognized as legal, upon the payment of certain fines and other expenses. It is held to be the duty of the trustees to preserve the leasehold estates by renewing at the usual periods for the benefit of the parties in remainder. In the absence of other direction by the settler, the fine, etc., for the renewal is to be paid out of the rents and profits in the proportion in which the *cestuis que trust* enjoy the estate. If a renewal becomes impracticable, the tenant for life does not reap the whole advantage of non-payment of the sum properly due for renewal, if there was an express trust for renewal. His interest, minus the expenses of the renewal, is all that was given him, and his proportion of the amount fairly to be paid for renewal is still a proper charge on the leasehold estate for the benefit of the remainder. Where the leasehold estate is for years, the amount to be paid is readily ascertainable by the proportion which the tenant for life enjoys of the leasehold estate; where it is for life, and there is no express fund created for the renewal, it is more difficult, and the court has sanctioned the plan of insuring the lives of the *cestui que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life. (Hill's Trustees, 436.) While the cases on this subject are complicated by the express provisions made in the settlements, and appear in some respects confused, they establish fully the position that, in the absence of direction otherwise, the property received is to be turned over by the tenant for life as he received it, and that his income is not the full rent and profit, but those after deducting therefrom, as accurately as it can be ascertained, his just pro-

portion of the expense of maintaining the security by renewal of the lease.

The tenants for life rely much upon *Hemenway v. Hemenway*, 134 Mass. 446. This was a bill in equity, by which was brought before us the whole management of a large estate, in which very ample discretionary powers had been given to trustees. The testator had left, subject to the trust, bonds payable at a fixed period. As between the tenant for life and the remainderman, it was deemed that the trustees, by the authority conferred by the clause of the will, "to hold the said property as they may receive the same, or at their discretion to sell the same," were entitled to continue those investments as such, and to retain those bonds until they were paid off, and that "the whole net income of the investments, thus authorized, must go to the tenant for life by the terms of the will."

There was also an investment made by the trustees in certain bonds having nearly eighteen years to run, on which a small premium had been paid. The case was decided upon its own peculiar circumstances, which, so far as disclosed, were held to show no special reason why the tenant for life should not receive the interest paid on the bonds. The investment constituted "a very small proportion of a large estate," and Mr. Justice Holmes remarks: "We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remainderman and the life tenants is such that there is less call than there might be in some other cases for treating the life-tenant with great strictness." It certainly was not held that the trustee might not, under some circumstances, purchase for the trust estate at a premium bonds payable at a fixed time, and, exercising his discretion honestly and for the purpose of dealing fairly with both parties, might not reserve as received, some portion of that paid as interest, sufficient at the end of the period to restore the premium to the capital, by the loss of which it would otherwise be depleted.

Upon the account rendered by the trustees in the case at

bar, as heretofore said, the question whether, by virtue of our supervision over trusts, the trustee should be ordered to change his investments, is not sought to be brought before us. Upon these, as they exist, the deduction from the full interest reserved, to restore the premium at the end of the term, was properly made. It is only thus that the property can be turned over to the remainderman undiminished. If the estate of the tenant for life terminates before the bond expires, the cost of effacing the premium will be borne in the right proportion by the respective *cestuis que trust*. In the opinion of the majority of the court, the entry should be "decree reversed."

HOLMES, J. If the opinion of the majority was on the ground that, so far as appears, the trustees might have made these investments with the intent to keep them until the trust expired or the bonds matured, and in the exercise of its discretion as a business manager, in view of the particular circumstances of the case, thought it necessary to retain a fund in suspense against a probable loss or premium, speaking for myself alone, I should have been disposed to acquiesce in that opinion. But from the main line of reasoning actually adopted, I must dissent upon grounds both of principle and authority.

Shortly stated, I understand that reasoning to be this: That, if a bond is bought at a premium, it must be assumed that the premium is paid, for the single reason that the rate of interest in the bond is higher than the market rate, because it must be assumed that the investment is absolutely safe; that, therefore, the analogy of wasting investments, such as leaseholds, applies, and that an annual deduction from interest is proper.

So far, this is precisely the argument that was pressed upon us with force in *Hemenway v. Hemenway*, and which was rejected after the gravest deliberation. A great part of the opinion was devoted to answering it, and it still seems to me that the discussion was necessary to the decision of the case.

Hemenway v. Hemenway did not bring before us the whole administration of the estate, but certain specific questions, one of which was whether the interest should make good the premiums paid by trustees for bonds purchased by them above par. If the rule now adopted had been recognized it would have been unnecessary and improper to look beyond the particular bonds to the rest of the account. It was because that rule was repudiated that it was said, and deliberately said, that nothing showed that the premium was paid for interest above the market rate, and that the whole administration of the trust might be considered. The latter principle is not the law in jurisdictions where authorized investments are limited in number, as in New York, but each investment is dealt with separately. The only reason for departing from the precedents elsewhere was, that, in the latitude allowed trustees in this Commonwealth, it was thought impossible to assume that premiums were paid in respect of interest alone.

I think, therefore, that the opinion of the majority is opposed to one of the points directly decided in *Hemenway v. Hemenway*, as it certainly is to the whole course of reasoning in that case, and I am confirmed in my opinion by the fact that two other of the four surviving justices who took part in the decision are of the same mind. I must suppose that *Hemenway v. Hemenway* has been accepted by trustees as expressing the settled opinion of the court. I cannot foresee the extent or nature of the evil that may follow from our abandoning what has been acted on as law. But I should be most unwilling to overrule a decision which I supposed to have been accepted as a guide in dealing with property, even if I thought it wrong. I do not, however, think either the decision or the reasoning in *Hemenway v. Hemenway* wrong, and I refer to that case for what I do not deem it necessary to repeat here.

But I understand the opinion of the majority not to stop with overruling *Hemenway v. Hemenway*. In this case the bonds thus far have not depreciated, but have risen in value. No part of the premium has been lost as yet; but the argument is either that it is to be presumed that the bonds will be

kept until the premium is lost, or else that the approach of maturity is a constantly acting cause which depreciates the bond so much each year with mathematical certainty, and that even if the depreciation is disguised by a more powerful motion the other way it must be allowed for, because the rise in value belongs wholly to the *corpus*, and would have been so much greater but for this counteracting influence.

I think I fully appreciate the logical force of this argument, but it appears to me to illustrate the danger of relying on logic when your premises are fictitious. The necessary premise for casting the whole burden of repaying premiums upon interest is that the premium is paid solely for interest above the market rate. If that premise is a fiction, as I think it is, and if considerations of policy are held, nevertheless, to justify its adoption, at least the conclusions to be drawn from it should be guarded and restrained by considerations of a similar nature. I can hardly think that, if the trust had been terminated, or the bonds sold at the date of the account, when the *corpus* had actually gained by the investment, the sums retained from interest would be paid over to the remainderman. Yet that conclusion would follow from the reasoning.

I think, in other words, that the question of holding the balance, even between tenant for life and remainderman, is a problem so dependent on the particular facts, and so complex, that, while we cannot hope to solve it with perfect accuracy, every one would feel that to cut the knot with a formula in the case I have supposed would be an unnecessary abandonment of the discriminations within our power, and as a practical judgment would be as likely to work injustice as justice.

If I am right so far, what difference can it make that the trustee has not sold? Whether it is or is not true, as is said in *Hemenway v. Hemenway*, that a determination not to sell, if a sale is possible, stands on much the same footing as a purchase, I apprehend that if a trustee, having the usual powers, sells and reinvests twenty times in as many days, he is not *ipso facto* guilty of a breach of trust, and that if the reinvestments are proper and profitable his conduct would not

be open to animadversion. On this point the English books can give us no light. At all events this trustee might sell now if he saw fit. On what ground is the determination of the trustee not to sell—a determination which the court cannot revise—to change the relative rights of the *cestuis que trust*?

Let us look a little further into the rule adopted. Suppose a sale to have taken place and other bonds to have been bought at a price above par. The trustee will, of course, compute the rate of interest to be received by the tenant for life in the future by deducting the annual sums necessary to replace the new premiums paid. But there is no particular sanctity in the rate which happened to prevail at the moment of purchase, still less in the rate artificially determined by the premium paid. If there has been no sale, but the market price of the bonds has risen, *ex hypothesi* the rate of interest is conclusively proved to have fallen, because the fall in the current rate of interest is the only recognized ground for a rise in price. Why is not the remainderman entitled to have a new computation started on that footing? Why is not the tenant for life entitled to have the reservation diminished if the rate of interest rises? And, pushing the principle to its logical result, why is not the trustee bound to follow the fluctuations of the market from day to day, attributing them all to the fluctuations of interest, as he is bound to do?

I now recur to the premises of the argument which I am opposing. I repeat what was said in *Hemenway v. Hemenway*, that I do not see how we can start with the assumption that all proper investments are absolutely safe when the leading case in this State is to the very point, that an investment may be unsafe and yet justifiable. (*Lovell v. Minot*, 20 Pick. 116.) But the assumption appears to me to be inconsistent with facts which we must notice, and to lead to conclusions not yet mentioned which we could not accept. Within a few years the first mortgage four per cent. bonds of a flourishing railroad have sold at eighty-five, while at the same time United States four per cents. stood at one hundred and twenty or more, and city four per cents. of a high rate stood at

about par. The differences were not to be accounted for by the difference of time which the bonds had to run or by exemption from taxation. I should be surprised to learn that either bond was not a proper investment. If they all were proper investments the difference in price could not be referred to difference in interest.

Again, if the fiction of safety be adopted, I still do not see why it does not follow that if a bond is bought below par the tenant for life is equally entitled to an annual increment on the interest received by him as the bond gradually approaches maturity. This was argued in *Hemenway v. Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds. There is a well known bond which was purchased by trustees a few years ago at fifty per cent. and which now stands at one hundred and twenty or over. How is a case like that to be dealt with?

If it be said that the consequences suggested follow only upon an attempt to carry logic too far, and that they are to be controlled by practical judgment, I agree. But I think that the same thing ought to be true of the step now taken, as I have said already. If we are to start with a fiction and then apply logic, I think these results follow. If we are to use our judgment I do not see why we should not use it at every step, and I believe that to make the tables referred to the universal arbiter between tenant for life and remainderman is not so near an approach to justice as we may hope to make. I am much more disposed to regard trustees as a sort of domestic tribunal *ex necessitate* between the parties, subject to the control of the courts in case of a want of good faith or reasonable judgment.

Finally, I must repeat what was said in *Hemenway v. Hemenway*, after an elaborate examination of the English books, that, in my opinion, the English cases do not apply the principle of wasting investment to premiums on authorized permanent investments. But even if they did I should consider that, in view of the latitude of investment allowed in Massa-

chusetts and the great fluctuations of American securities, it would be undesirable to accept that principle at present and still more so to adopt the simple device of the tables as the means of working out that principle.

I express no opinion upon the question of jurisdiction which I have not thought it necessary to examine, as both parties desire to have the case dealt with upon its merits now. I am authorized to state that the Chief Justice and Mr. Justice Charles Allen concur in the views which I have expressed.

QUINN vs. SHIELDS.

[62 Iowa, 129.]

CHARITABLE DEVISE.—BENEFICIARIES TO BE SELECTED BY LIFE-TENANT.

A devise with a direction that what remains at the devisee's death shall be devised by him "to the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as he may determine, is valid.

ACTION for the construction of a will.

Stiles & Beaman, for appellants.

H. B. Hendershott and *McNett & Tisdale*, for appellees.

BECK, J. Mary Tally, deceased, executed a will, in the sixth item of which she directs that a certain note and mortgage securing it, made to her by The Sisters of the Humility of Mary, a corporation organized under the laws of the State, should be surrendered to that corporation, and should be canceled without payment. The seventh item of the will disposes of certain notes and mortgages by directing, in the language of the will, that the securities "shall go and be held and controlled and managed by my friend and relative, Miss Mary T. Shields,

for and during her natural life, and for her and to her sole benefit, and, at the death of Mary T. Shields, I desire, and my will is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as shall remain in the hands of Mary T. Shields unexpended, shall go to the support and encouragement of such worthy and charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine, and she is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein entrusted to said Mary T. Shields, for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go, as above provided, to some Catholic institution or institutions."

The ninth item directs that Mary T. Shields "shall take and hold, for the purposes mentioned in the seventh subdivision [item] of this will," certain real estate, "or the proceeds which may arise from the sale of said property."

The plaintiffs are the heirs at law of Mary Tally. They allege in their petition that The Sisters of the Humility of Mary, which is claimed to be a corporation organized under chapter 2, title 9, of the Code, which provides for the organization of corporations other than those for pecuniary profit, is not, by its articles of incorporation, intended or required to act for any of the purposes specified in the chapter of the Code referred to, or for any public charity or purpose, but exercises its powers for adequate compensation, and for private gain to itself or to its individual members. It is claimed in the petition that the incorporators, as is shown by the articles of incorporation, have and are to have no associates, or accession to their numbers, and that the incorporation does not hold its property in trust, but as an absolute owner, having power to manage, control, and dispose of all property for the benefit of itself and the incorporators.

It is also claimed that the devise to the corporation is not by its terms in trust, but is an unqualified gift, without any direction or obligation imposed to use the funds for any charity.

It is also shown that the will is witnessed by Ellen Galvin, one of the incorporators, who has ever since been a member of the incorporation, and that, as but one other witness attests it, the corporation cannot take under the will, by reason of the alleged fact that Ellen Galvin is not, as is required by the statute, a disinterested and competent witness. This claim is based upon the allegation of the petition above set out.

It is alleged in the petition that the bequest in the seventh item, and the devise in the ninth, are void for uncertainty, inasmuch as the will does not indicate the persons or objects for which the funds and property shall be appropriated.

It is shown by an amendment to the petition that the incorporators, who are the only members of the corporation of The Sisters of the Humility of Mary, are all aliens, and none of them are citizens of the United States and of this State. For this reason it is claimed that they are not authorized by the laws of this State to become an incorporated body.

The defendants, the executors named in the will (Mary T. Shields being one of them) which has been admitted to probate, and the legatee and devisee named in the sixth, seventh and ninth items of the will as above shown, demurred to the petition, on the ground that it fails to show facts entitling plaintiff to the relief claimed. The demurrer was sustained. The case is before us for determination upon the pleadings.

It will be observed that the petition assails the respective items of the will on different grounds. 1. The bequest to The Sisters of the Humility of Mary is claimed to be void, for the reason that Ellen Galvin, one of the two witnesses to the will, is not competent and disinterested. The claim is based upon the ground that the corporation is not a charitable institution, but is a private corporation for profit, and the witness to the will has a property and interest in its assets. 2. The incorporators and members of the corporation are not citizens of the United States and of this State. 3. The bequest and devise to Mary T. Shields is claimed to be void for uncertainty. We will proceed to consider these grounds of objection to the will.

We will proceed to inquire whether Ellen Galvin, under the facts of the case as disclosed by the allegations of the petition,

is a competent and disinterested witness to the will. It may be premised that the questions relating to the character and powers of the corporation of The Sisters of the Humility of Mary, and whether it is a corporation for charitable purposes or for pecuniary profit, relate alone to the question of the competency of the witness to the will. If she is a competent witness, and there is, on the grounds of her interest, no objection to the will, the corporation will take the property without regard to its character and powers.

The allegations of the petition, urging the objections to the will on the ground of the interest of the witness, are all based upon or refer to the articles of incorporation of The Sisters of the Humility of Mary. It becomes necessary to consider these articles, in order to determine the question before us. This can be better and more fairly done by setting out in full the articles of incorporation, which are in the following language :

“ARTICLES OF INCORPORATION OF THE SISTERS OF THE HUMILITY OF MARY, made and adopted this eleventh day of May, 1878, in accordance with the provisions of chapter 2, title 9, of the Code of Iowa, A. D. 1873 :

“ART. 1. The name of this corporation shall be ‘The Sisters of the Humility of Mary.’

“ART. 2. The territory of its business shall be the State of Iowa, with its principal place of doing business Ottumwa, Wapello county, State of Iowa.

“ART. 3. The incorporators are, Mary Catherine Manjean, Mary Lawler, Ellen Galvin, Ellen Wogan, Anna Patterson, Margaret Burke, Jane Mangan and Josephine Gerardine.

“ART. 4. The object and purposes of this association are to afford a greater opportunity and more security to the incorporators and their successors, in the establishment and management of hospitals, schools, asylums, and other institutions, for the relief, education and care of the poor, the needy, the distressed, the orphan, and the ignorant.

“ART. 5. The business, funds and property of this association shall be managed, controlled, protected and preserved by a council of three, chosen from the members of the association, who shall hold their offices for three years, and until their suc-

cessors are duly elected and qualified, and the council of three for the first three years shall consist of Mary Catherine Manjean, Mary Lawler and Ellen Galvin.

"ART. 6. The persons named in Article 5 shall, within three days after the incorporation of this body—or as soon thereafter as they conveniently can—and the members of each succeeding council shall, within a like time after their election, proceed to elect by ballot from their number, for the ensuing three years, a Superior, and to appoint such other officers and agents as they may deem expedient and necessary, and who shall hold their offices and agencies for the term of three years, and until their respective successors are duly appointed and qualified, or, if they are appointed for a less time than three years, then for the time they may be appointed, unless sooner discharged.

"ART. 7. The council of three shall have power to adopt by-laws and regulations as they may deem proper for the control and management of the hospitals, schools, asylums, and other establishments under their care and control, and the efficient government of their own council, and the officers and agents appointed thereby, such by-laws, rules and regulations, not being contrary to these articles, the laws and Constitution of the United States and of the State of Iowa, and the said council may do and perform everything proper and necessary to be done to carry out the objects and purposes of this association, but in no case shall any officer or agent of this association be paid any sum for her services as such.

"ART. 8. The parent house in this State, and the principal place of doing business, shall be located at the city of Ottumwa, in the county of Wapello, Iowa.

"ART. 9. The association shall have full power and authority to acquire, possess, hold, use, and enjoy by gift, grant, devise, bequest, purchase or otherwise, real estate or personal property, and shall have power to sell, convey, mortgage and dispose of the same in any manner the said association shall deem best for the interest of the association and the furtherance of the objects and purposes for which their association is created.

"ART. 10. This corporation shall have a seal, on which shall

be engraved the words 'The Sisters of the Humility of Mary, Ottumwa, Iowa,' and which shall evidence its official and corporate acts.

"ART. 11. This corporation shall have power to sue and be sued, to make contracts, and in general to do all the acts of a natural person, which may be necessary to carry out its objects and purposes.

"ART. 12. This corporation shall endure for twenty years, as provided by sec. 1069 of the Code of Iowa, of 1873, and shall have the privilege of re-incorporating, as provided by sec. 1102 of said Code, and in general shall enjoy all the powers, privileges and immunities and benefits provided for by the laws of the State of Iowa, for the purpose for which it is created."

The fourth article of the foregoing instrument declares that the purpose of the association is to enable the incorporators to establish and manage hospitals, schools, asylums, and "other institutions, for the relief, education and care of the poor, the needy, the distressed, the orphans and the ignorant." These objects are all essentially charitable, and are never pursued, when under the care of religious sects, whether Catholic or Protestant, with the view of pecuniary profit. The distribution of dividends to corporators or others arising from the earnings or profits of such institutions is an unheard of thing. The idea of making money out of such institutions, where, as in the case before us, they are established and supported "for the relief, education and care of the poor, the needy, the distressed, the orphans and the ignorant," could never have been entertained.

There is nothing in the articles of incorporation disclosing any such a purpose. On the contrary, the instrument, considered in the light of the public history of such institutions, shows that there was no such purpose on the part of the incorporators. Article 7 declares that the officers and agents of the corporation shall receive no compensation for services rendered. It is true that pupils in the schools, or patients in the hospitals, may, as is claimed, in some instances or in most instances, pay the institution for services rendered. But it does not follow that the sums so secured, or any part of them, may or can be di-

vided as profits. It is true that all such institutions, when established by religious sects, are endowed by funds given or bequeathed by the benevolent, and it is also true that they cannot be successfully conducted without such endowments. It clearly appears that the incorporators of the association in question can receive no dividends or profits therefrom. The witness to the will, therefore, has no pecuniary interest, based upon the right or expectation of receiving dividends or profits.

But it is urged that, upon the dissolution of the corporation, its assets will be divided among the corporators, and, for that reason, the witness has an interest in the property bequeathed by the will. For the purposes of the case, let the position be admitted, though we do not so hold, and, to say the least of the proposition, it is extremely doubtful.

But such interest is uncertain and contingent. It depends upon whether the witness will survive the dissolution of the corporation; whether it will, when dissolved, have any assets to distribute, or whether it may not by re-incorporation continue to hold the funds indefinitely. The interest, to disqualify the witness to a will, must be present, certain and vested. (See *Hawkins v. Hawkins*, 54 Iowa, 443.) In that case, it is held that a wife has no such interest in a legacy to her husband as will disqualify her to witness the will. Yet, surely, the interest of the corporator signing the will in this case as a witness is not less remote, uncertain and contingent than the interest of a wife in a bequest to her husband. We conclude, therefore, that Ellen Galvin is a competent and disinterested witness to the will involved in this case.

It is urged that, as the incorporators and present members of the corporation of The Sisters of the Humility of Mary are not citizens of the United States and of this State, the will, so far as it requires the notes and mortgage executed to the decedent to be canceled, is void. The thought upon which the position is based is that, as the statute (Code, § 1095) requires corporators of associations to be citizens of the United States, and at least a majority of them to be citizens of the State, the corporation has no legal existence, and therefore it cannot resist plaintiffs' claim made in this action. The repetition of certain

facts in this connection will aid a clear understanding of our conclusions upon this point, and the reasons upon which they are based. The Sisters of the Humility of Mary, as a corporation, executed a note and mortgage to the decedent, Mary Tally, of whom plaintiffs are heirs. The sixth item of the will in question directs that the note and mortgage be canceled and surrendered to the Sisters without payment. Plaintiffs claim that the note and mortgage should be regarded as assets, not subject to the will, but subject to distribution to the heirs of decedent.

They do not claim that these instruments are invalid and not binding, upon the ground of the illegal organization of the corporation, or for any other reason. On the contrary, we understand that they insist that they are capable of being enforced. If they are void, it would be a vain thing for plaintiffs to contend about the direction they take, whether to the legatee or the heirs. We have, then, the case of the plaintiffs insisting that the note and mortgage are valid, but that the bequest directing their collection is void, for the reason that the corporation is not legally organized.

Code, section 1089, provides that "no body of men acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation; nor shall any person sued on a contract made with such corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense."

This provision, it will be observed, sustains plaintiffs' position that the note and mortgage cannot be resisted by the Sisters on the ground that they are not legally incorporated.

The provision goes further, and declares that, in an action brought by a corporation upon contract, or for injury to its property, or "for a wrong done to its interest," the defendant cannot plead in defense the want of legal organization of the plaintiff corporation. The purpose of the section is to provide that the enforcement of rights against corporations, and the enforcement by a corporation of contracts made with it, and the recovery of claims for "a wrong done to its interest," cannot

be defeated on the ground that the corporation was not legally organized. It cannot be claimed that these provisions apply only when the corporation, or the person contemplated in the section, is defendant in an action. But if the rights contemplated in the section are attempted to be enforced in an action, the provisions apply, whether the person claiming them is a plaintiff or a defendant. It often happens that rights to property, or rights under contracts, or "a wrong done to the interest" of a person, are enforced by defendants to actions. In such case the provision applies.

Is the subject-matter of this action, so far as the Sisters' corporation is concerned, of such character as to bring the case within the rule of this section? It involves the right of the corporation to the securities bequeathed in the sixth item of the will. The Sisters insist on the enforcement of this item; plaintiffs insist that it is void, and resist its enforcement by asking that it be declared void by a proper decree of the court.

The contest is over the right based upon that item. It is in the nature of a contract, which, "in its more extensive sense, includes every description of agreement or obligation whereby one party becomes bound to another to pay a sum of money, or to do or omit to do a certain act; or a contract is an act which contains a perfect obligation." (Bouvier's Dictionary.) It is said in Chitty's Contracts, p. 1, that "the term *contract* comprises, in its full and more liberal signification, every description of agreement, obligation, or legal tie, whereby one party binds itself or becomes bound, expressly or impliedly, to another to pay a sum of money, or to perform or omit to do a certain act." An obligation of record, as a judgment, recognizance, or the like, is included within the term contract. A bequest falls within the term, and when the will is admitted to probate it is to be regarded as a contract of record. It follows that, where a corporation seeks to enforce a bequest in a will duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. This is the precise case before us. In this action, the corporation ask that the will be enforced; the plaintiffs seek to set it aside on the ground of illegality in the corporation's organization. But

on that ground its validity cannot be questioned, as we have seen.

This construction of the statute in question is demanded by justice and the interest of the public. Corporations defectively or illegally organized may acquire great property interests in personal and real estate and choses in action. Their business is conducted and properly managed in the same manner as though they were legally organized, and the interest and rights of all parties dealing with them are involved. If, in an action to enforce any right held by a corporation, it were declared to have no legal existence, great confusion and losses would result, not only to its members, but to persons having dealings with it.

This view does not ignore and disregard the statutes prescribing the manner of organizing corporations, or providing as to the character of the persons who shall be incorporators. These statutes may be enforced by proper proceedings at law by *quo warranto*, and if it be found that a corporation is not legally organized, and should be ousted of its franchises, and dissolved, trustees will be appointed, who, under the direction of the court, will protect the creditors of the corporation and all persons interested in its property. (See Code, §§ 3345, 3360, 3367.)

We come now to the consideration of the bequest and devise found in the seventh and ninth items of the will. They need not be separately referred to in our discussion of the principles of law, the same doctrines applying to both.

It plainly appears that in these items a life-estate in the real property, and the income arising from the personalty during the life of Mary T. Shields, are willed to her. This is not denied by either party. The only question in dispute is this: Does the will so dispose of the estate in remainder in the realty, and the funds that shall be found upon the death of the devisee and legatee, that the court will enforce its provisions. Counsel for plaintiffs insist that these items of the will are void for uncertainty. This statement discloses the question for our decision in this branch of the case.

It is first insisted by plaintiffs' counsel that the objects and charities mentioned in the will, to which the real estate and funds are to be appropriated, are so uncertain that the law will

not and cannot effectuate the intentions of the testator, and enforce the will. The foundation of this position is that the will does not, with sufficient certainty, indicate the beneficiaries of the charity.

Reading the items of the will in question, we discover the testament in the following language: "I desire, and my will is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as may remain in the hands of said Mary T. Shields, unexpended, shall go to the support and encouragement of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine." The beneficiaries of the charity of the testator are here clearly indicated to be "such worthy and meritorious" institutions of the "Roman Catholic faith," as may be determined by Mary T. Shields. The will does not specifically name the persons or institutions that are to receive the charity. It leaves the beneficiaries to be chosen and named by the person appointed to distribute the charity. It is competent for a testator to bestow a charity upon a person or institution to be chosen or named by a trustee or executor. In that case, there is no uncertainty of the beneficiary, for the courts, when called upon to enforce the testament, will be advised of the direction of the charity by the act or declaration of the trustee or executor. Wills providing for the distribution and appropriation of charities in this manner are always upheld by the courts. (Perry on Trusts, § 731; 2 Redfield on Wills [2d ed.], pp. 530-535; *Hesketh v. Murphy*, 35 N. J. Eq. [8 Stewart], 23; and see cases cited in note by reporter; *Wells v. Doane*, 3 Gray, 201; *Brown v. Kelsey*, 2 Cush. 243; *Saltonstall v. Sanders*, 11 Allen, 446; *First Universalist Society of North Adams v. Fitch*, 8 Gray, 421; *Going v. Emery*, 16 Pick. 107; *Miller v. Teachout*, 24 Ohio St. 525; *Am. Tract Soc. v. Atwater*, 30 Ohio St. 77; *De Bruler v. Ferguson*, 54 Ind. 549; *Com. of Lagrange Co. v. Rogers*, 55 Ind. 297; *Pickering v. Shotwell*, 10 Pa. St. 23; *Witman v. Lex*, 17 S. & R. 88; *Beaver v. Filson*, 8 Pa. St. 327; *Perin v. Carey*, 24 Howard, 465; *Loring v. Marsh*, 6 Wall. 337.)

An elaborate note to *Hesketh v. Murphy* (*supra*), by the reporter and another, found in the Am. Law Register, vol. XXI (N. S.), pp. 660-666 (October, 1882), cites scores of cases holding that similar dispositions of charities by will are valid. It also gives quite a number that may be cited against the doctrine. We doubt not, however, that the conclusion we reach is supported by the great weight of authority. The facts of this case distinguish it from *Le Page v. McNamara* (5 Iowa, 124).

We reach the conclusion that the will is not void for uncertainty of the beneficiaries of the charity.

We are to inquire whether there is a *trustee* named in the will, whose act or designation will render certain the beneficiaries of the charity. This may be admitted, for the purposes of the case, without so deciding, to be necessary. Counsel for plaintiffs insist that the will provides for no such trustee. We think the contrary clearly appears, and that the instrument in the plainest terms names Mary T. Shields as such trustee. The language of the will following that last quoted is as follows: "She [Mary T. Shields] is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein entrusted to said Mary T. Shields for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go, as above provided, to some Catholic institution or institutions."

It cannot be doubted that, if the words "by will properly executed before her death" had been omitted, the language would have clearly indicated the creation of a trust, and directed its execution. But counsel for plaintiff urge that, as these words limit the power of Mary T. Shields to make the appropriation of the charity and designation of the beneficiaries by will, she cannot, therefore, be regarded as a trustee. There is no force in this position for these reasons: Suppose Mary T. Shields should waive her life-estate and interest in the property, can it be doubted that she could then indicate the beneficiaries to receive the charity? Or can it be doubted that she has the right and power to surrender her life-estate? In case she should do so, the trust could be executed by her in her life-

time. Can it be said that she will not do so? Surely chancery will entertain no such presumption.

But we are able to discover no reason why the trust may not be executed by a will, as permitted or contemplated by the language of the testament before us. Indeed, the provision seems to have been suggested by common sense, seeking to effectuate the intention of the decedent. She intended that Mary T. Shields should enjoy the property during her life, and she further intended that the same power should direct the charity to the beneficiaries who should finally receive it. When Shields' rights shall cease, she will be no more in life, and will, therefore, be incapable of then naming the beneficiaries. But property may be disposed of by will, and the decedent, in the exercise of good common sense, chose that character of disposition on the part of Shields which would perfectly carry out the intention of the testator. We know of no legal principles which will defeat the will on this ground, and have been referred to no authorities so holding. The authorities hold, we think, that a power relating to a trust may be executed by a will, where the power creating the trust so provides. (See 4 Kent's Com. *330; 2 Hilliard's Real Prop. p. 563, § 41; 2 Greenleaf's Cruise on Real Prop. p. 534, § 16; 1 Jar. on Wills, p. 547; 1 Story's Eq. Jur. § 173, and notes.) These authorities go to the extent of holding that, when no form for the execution of the power is prescribed, it may be executed either by deed or will.

It is urged that Shields may not execute a will, and in that case the court cannot enforce the will, for the reason of the uncertainty that will exist as to the beneficiaries of the charity. We cannot presume that the trustee will neglect to discharge the duty imposed upon her of naming by will the beneficiaries, but, on the contrary, must presume that she will, in the discharge of her duty, indicate by testament the objects to which the charity shall be appropriated. But, at all events, that question cannot now be anticipated. It will be time enough to meet it when Shields dies without making the disposition of the property by will, if such a thing should happen.

It is insisted that Shields, by the will, takes no title to the

real estate mentioned in the ninth item. This position is based upon the thought that she is not made a trustee by the will. But, as we have shown, she is regarded as a trustee. The objection, therefore, falls. In order to create a trust estate by will, the law requires no particular form of words to be used by the deviser. If his intention is sufficiently disclosed, that the property shall be held and disposed of by the trustee named, a trust estate vests in the trustee under the will.

The foregoing discussion disposes of all questions necessary to be considered in the disposition of this case, and brings us to the conclusion that the judgment of the District Court ought to be affirmed.

See *Goodale v. Mooney*, *ante*, p. 1, and cases in note; *Hesketh v. Murphy*, 3 Am. Prob. R. 7.

GILMAN vs. McARDLE.

[99 New York, 451.]

PROVISION FOR SAYING MASSES.

A deposit of a sum of money with a third party, on his undertaking to apply the same to the use of the depositor and her husband during their lives and after their deaths to pay therefrom their funeral expenses and the costs of suitable monuments, and to expend the residue in procuring masses to be solemnized according to the ritual of the Roman Catholic Church, creates a valid contract, irrespective of the legality of a trust to say masses.

THE opinion states the case.

Richard L. Sweezy, for appellant.

William M. Snyder, for respondent.

RAPALLO, J. This action is brought by the administrator of James Gilman, deceased, to recover of the defendant certain money which had been placed in his hands by Margaret Gilman, the wife of said James Gilman, a few days before her death. James Gilman survived his wife but a short time. Both died intestate, and the plaintiff, a half nephew of James, took out letters of administration upon his estate. No administration appears to have been granted upon the estate of Margaret Gilman.

The facts of the case are uncontroverted. Only one witness was examined on the trial, and that witness was the defendant.

From his testimony it appears that Margaret Gilman, prior to her death, had money in savings banks. She was about eighty-five years old, and her husband was upwards of ninety years of age. They had no descendants, and she supposed or stated to the witness that she had no next of kin and that her husband had no relatives except a brother who was in a monastery, or some other religious establishment, in Ireland. The defendant was an intimate friend of both of thirty years' standing. Both were Roman Catholics.

Margaret had several conversations with the defendant in respect to the money which she had in the savings banks. She expressed the desire to get her money out of the banks so that the lawyers would not get hold of it. About a week before her death she sent for the defendant and delivered to him her bank-books, and instructed him to draw the money out of the banks and apply it to certain purposes. He drew the money during her lifetime on her written orders. The finding of the trial judge is, that on or about the 23d of August, 1892, said Margaret Gilman placed in the custody of the defendant, Henry McArdle, about \$2,299, and directed said McArdle to use said money for the support and maintenance of herself and her said husband as long as they lived, and after the death of the survivor of them, to use the residue of said money to pay their respective funeral expenses, and pay for the erection of a suitable monument to their memories, and to expend the amount remaining in his hands, after such payments, for

Roman Catholic masses, to be procured by him to be said for the repose of the souls of herself and her said husband; that the defendant received the said sum of money upon the terms and condition stated above, and promised to apply it to the uses and purposes therein mentioned.

Margaret died on or about September 1, 1882, and her husband died on or about October 13, 1882.

The defendant, after receiving the fund, expended a portion of it for the purposes directed, and there is a balance remaining in his hands, for which he is directed, by the judgment appealed from, to account to the plaintiff.

The plaintiff claims in the first place that the transaction, as found, created a mere agency, revocable at the pleasure of Mrs. Gilman; that no title to the fund passed to the defendant, and consequently the agency was revoked by her death, and the title to the fund vested absolutely in her husband as her legal representative. This view was sustained by the court below, and was one of the grounds upon which its judgment was placed.

We cannot concur in the proposition that a mere agency was established. Passing for a moment the questions which arise upon the undertaking of the defendant as to the application of the surplus which might remain after paying for the support of Mrs. Gilman and her husband during their lives, we think that a valid trust was created to provide for such support, which trust placed the fund beyond the control of Mrs. Gilman and vested the title to it in the defendant as trustee. A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law. Such a trust may be created without writing, and the delivery of the property is sufficient to pass the title. (Perry on Trusts, 586; *Day v. Roth*, 18 N. Y. 443.) The trust may be for the support of the person who creates it, and is valid except as to creditors. The statute of frauds (2 R. S. 135, § 1) provides that "all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person," clearly im-

plying that they are valid as between the parties. In this case the trust was not merely for the support of Mrs. Gilman, but for that of her husband during his life, and was one which he could have enforced. In *Stone v. Hackett* (12 Gray, 227) it was held that the delivery, without consideration, of certificates of shares in a corporation, with blank powers to transfer indorsed, in trust to pay the income to the settler during his life, and at his death to transfer the shares to certain charitable objects, was valid, and vested the title to the shares in the trustee, even as against the widow of the settler, and this, notwithstanding that a power was reserved to the settler to modify the uses or revoke the trust. It was there held that the delivery of the certificates with assignments of some of them, and powers of attorney to transfer others, was equivalent to a completed transfer, and passed the title to the trustee, and that the reservation of a power to revoke the trust was immaterial, a power of revocation being perfectly consistent with a valid trust. In the present case the delivery of the money was complete, and there was not even a power of revocation reserved. In *Davis v. Ney* (125 Mass. 590) a depositor in a savings bank delivered her bank-book, accompanied by an assignment of her deposit, to B., upon an oral agreement that B. should draw for her what money she wanted during her lifetime and pay the balance, if any, left at her death, to her son, and this was held to be a valid trust.

In this case, at the time of the death of Mrs. Gilman, the title to the fund, or so much of it as had not then been applied, was in the defendant, as trustee, upon a valid trust for the support of her husband as long as he should live. If he had lived long enough this trust might have consumed the whole of the fund, which was not large, and nothing passed to the husband or representatives of Mrs. Gilman, unless it be the contingent right to the surplus, if any should happen to remain after the death of Mr. Gilman, and if it should be held that no valid disposition had been made by Mrs. Gilman of this surplus. So long as he lived he had no legal title to any part of the fund.

The defendant, in pursuance of his promise and undertaking, did apply a portion of the fund remaining, to the funeral expenses and monument, as directed by Mrs. Gilman, and no question is made, in this case, as to those expenditures, but the plaintiff seeks to recover the balance, which according to the directions of Mrs. Gilman, which defendant agreed to carry out, was to be devoted to procuring masses.

The court below held, as to this surplus, that the defendant held it as a mere agent whose authority was revocable, and also that no valid trust had been created; that there was nothing illegal or contrary to public policy in the purpose to which the defendant had undertaken to devote it, but that as a trust it was void for want of a beneficiary who could enforce it, both of the persons, for whose benefit the masses were to be solemnized, being dead.

The conclusion of the learned court that a valid trust was not established in respect to the surplus admits of much discussion, and we do not propose now to decide that question. It is said, by the learned annotator of the 11th edition of Kent's Commentaries (vol. IV, p. 305, n. 2), that the essential requisites of a valid trust are, first, a sufficient expression of an intention to create a trust, and second, a beneficiary who is ascertained, or capable of being ascertained; and that, outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in the case of *Beekman v. Bonsor*, the same learned jurist, in delivering the opinion of this court, says: "A gift to *charity* is maintainable in this State if made to a competent trustee, and if so defined that it can be executed *as made by the donor*, by a judicial decree, *although it may be void according to general rules of law for want of an ascertained beneficiary.*" (*Beekman v. Bonsor*, 23 N. Y. 298, Comstock, J., at p. 310.)

Whether the doctrine above enunciated has in this State undergone any change, or whether the disposition made by Mrs. Gilman can, in respect to the surplus in controversy, be construed as a charitable, pious or religious use, and sustained

on that ground, are questions upon which we reserve our opinion.

The learned judge who rendered the judgment in the present case expressed the opinion that the disposition in question would have created a valid trust if contained in a will, though not valid under the circumstances of this case as a disposition *inter vivos*, but it seems to us that any trust of property which would be valid if created by will, can be created by the owner of the property in his lifetime, provided it is then to go into operation, although it is to be executed after his death, and that in the case of money or personal property, it may be created by oral agreement accompanied by a transfer or delivery of the property, and that such delivery will pass the title to the property, and that as a trust its validity is to be tested by the same rules whether it be created by will or by contract *inter vivos*.

In the *Matter of James Schouler* (134 Mass. 426) a case very similar to this was decided. The deceased, by an informal testamentary writing, authorized the Rev. T. L., after her death, to withdraw from a savings bank the contents of her bank-book and to dispose of them, part for her funeral expenses and the residue for "charitable purposes, masses," etc. The court held that the terms of the bequest clearly manifested the intention to create a trust in the Rev. T. L. and that it was valid; that masses were religious ceremonies of the church of which she was a member, and came within the religious or pious uses which are upheld as public charities, citing the case of *Jackson v. Phillips* (14 Allen, 539, 553). Rev. T. L. having died, the Supreme Court appointed Archbishop Williams trustee in his place, and ordered the administrator *de bonis non* of the deceased to pay the money to him, to be applied according to the directions of the will.

By reference to the case cited it will be seen that in the State of Massachusetts the English doctrines on the subject of charitable uses, and the *cy pres* doctrine, still prevailed, and on that ground the court upheld a trust which by reason of its indefiniteness, if for no other reason, could not be sustained in this State.

But in the case before us, even if it should be conceded that the agreement under which the defendant received the money could not be sustained strictly as a trust, on the ground of the want of a beneficiary to enforce it, it would not follow that it was of no effect whatever. As a trust the same objection, if valid, existed to the undertaking to apply the fund to defraying the funeral expenses of the deceased and her husband, and to the erection of a monument to their memories, but it would be a great abridgment of the rights of property, to deny to any person the power, in his lifetime, to enter into a contract to be performed after his death by another person, to do or procure to be done any act not objectionable as against any rule of law, morals or public policy, and to pay the consideration for the performance of such contract. It appears in this case that the defendant was an undertaker; that the deceased selected the kind of coffin she desired, and described the monument she wished erected, and specified the times at which the masses were to be solemnized, and the finding of the court is, that the defendant received the money on the terms stated by the deceased, and promised to apply it to the uses and purposes therein mentioned. There was no indefiniteness about this contract, and it was easy of performance. There certainly can be no legal objection to a person contracting in his lifetime for his funeral, his coffin and his monument, and even for the solemnization of masses, and paying for them in advance, and if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure those things. Suppose a person should desire in his lifetime to provide for the writing of his biography, the publication of his literary works, the painting of his portrait, or the erection of a statue to his memory after his death. He certainly can make a valid contract with any person to do either of those things, and pay for them, and although they may be personal to himself and for the gratification of his own feelings and perhaps his vanity, and he cannot, in strictness, create a trust for the purpose, because there will be no beneficiary, as he will not live to enforce it, why should he not be at liberty in his lifetime to

contract with some person of his confidence to procure them to be done, and as a consideration for such agreement, to pay him the sum necessary to defray the expense. Such a contract could be enforced by the legal representatives of the promisee, and in case of a refusal to perform, they could recover the consideration paid. It certainly must be in the power of a person to provide, either by will or contract, for matters of this description, and I can see no legal reason why he should be confined to a testamentary direction. It is only in respect to dispositions of property which are not to have any effect except upon the death of the owner and are revocable, that he is confined to a will. If they operate *in presenti*, they are valid as contracts, even though they are not to be carried into execution until after the death of the party making them, or may be contingent upon the survivorship of another. (*Matter of Diaz*, 50 N. Y. 93.) Even an agreement *inter vivos* that one shall by will bequeath to another a sum of money is valid though the promised bequest cannot take effect until after the death of the promisor.

Where money is paid by A. to B. on the promise of B. to invest or employ it in a specified, definite and lawful manner, a valid contract is made, and I can see no reason why the contract may not be to employ the money, in the specified manner, after the death of A. If there is an ascertained beneficiary interested in the performance of the agreement, he can, after the death of A., enforce it as a trust. If there is no such beneficiary, the right to enforce it as a contract, or in case of refusal to perform, to recover the consideration paid, passes to the legal representatives of A. Of course all this is subject to the reservation that there is nothing in the contract which violates any law, even the statutes against perpetuities.

In this case the agreement was to expend the surplus, if any should remain after providing for the support of Mrs. Gilman and her husband, and their funeral expenses and monument, in procuring certain masses to be solemnized according to the ritual of the Roman Catholic Church, of which they were members, a duty quite definite and easy of performance on

payment of the customary charges. We concur with the court below in holding that there was nothing illegal in the purpose, nor can any person rightly complain that it involved any injustice. The money was her own. She disregarded no ties of kindred, for she had none, and she undertook to devote her little accumulations to the benefit of herself and her aged husband so long as they might live, and to securing them a becoming burial, to be followed by those religious ceremonies which, according to their belief, were important; but we cannot concur in holding that a mere agency was intended to be created. Such a theory is conclusively refuted by the nature of the contract itself. The title to the money delivered by Mrs. Gilman to the defendant vested in him as trustee under the first trust, for the support of herself and her husband during their lives, which was irrevocable. The undertaking as to the contingent surplus was not to be performed as agent for either of them, for it could not be performed until after their death, when there would be no principal. The intention, manifestly, was that the title to the money should pass to the defendant in consideration of his promise that he would expend an equivalent sum in the designated masses, and this was the substance of the contract.

We are of opinion that this contract was valid, and that the representatives of Mrs. Gilman had no right of action except in case of a breach of the contract by the defendant. Whether the representatives of Mr. Gilman had any right of action in any event is a question not determined in this case. No breach or intended breach being charged, we think the plaintiff established no cause of action and his complaint should have been dismissed.

As the case comes before us on a conceded state of facts and only a question of law is presented, the judgment appealed from should be reversed, and the complaint dismissed, with costs.

All concur, except ANDREWS and FINCH, JJ., dissenting; EARL, J., concurring on the ground that there was a valid trust.

Judgment accordingly.

Bequests for masses.—About the period of the Reformation statutes were passed to defeat or prevent dispositions of property to purposes which were then accounted superstitious. Under the operation of these statutes the courts at that time inclined to construe many devises and bequests superstitious which would not now be questioned, and if it happened that one of these uses did not come within the letter of these statutes, the courts would declare it superstitious and void by the general policy of the law. Bequests for masses are particularly proscribed in the statute 1 Edw. VI, c. 14, wherein it was declared that a great cause of superstition and error in Christian religion was the fantasizing of vain opinions concerning purgatory and masses satisfactory for the dead, etc. Such a bequest was therefore declared void in the cases of *West v. Shuttleworth*, 2 My. & K. 684; *In re Blundell's Trust*, 30 Beav. 360; *Heath v. Chapman*, 2 Drew. 417; *Att'y-General v. Fishmongers Co.* 2 Beav. 151. See, also, *Yeap v. Ong*, L. R. 6 P. C. 396.

So, also, shortly before the period of these last cited cases, it was held, construing these statutes, that a bequest to Mr. Baxter, the dissenting preacher, of £600, to be distributed among sixty pious ejected ministers, "because," as the testator assigned the reason, "I know many of them to be pious and good men and in great want," was void as superstitious, and likewise as to a legacy to Mr. Baxter to be expended in circulating copies of his book "A Call to the Unconverted." *Att'y-General v. Baxter*, 1 Eq. Cas. Ab. 96, p. 9; s. c. 7 Ves. 76.

Including the souls of others with his own in the supposed benefit of the bequest for masses will not validate it. *West v. Shuttleworth*, *supra*.

But in Ireland it was held that a bequest for masses for the testator's soul was valid. *Read v. Hodgins*, 7 Ir. Eq. Rep. 17.

A bequest to a convent of nuns, whose sole object is the sanctifying their own souls and not performing any external duties of a charitable nature, was also declared superstitious and void. *Cocks v. Manners*, L. R. 12 Eq. 574.

But the modern tendency, both in England and in this country, and equally whether the decision proceeds upon the doctrine of *cy pres* or upon general modern common law principles, is quite away from any such construction of the rules as to charitable and superstitious uses, as the leading case indicates, and a bequest for masses to be said for the repose of the testator's soul would undoubtedly, in every State in the Union, under proper circumstances, be sustained.

VAN HORNE vs. CAMPBELL.

[8 Eastern Reporter, 84, New York Court of Appeals, November, 1885.]

EXECUTORY DEVISE DEPENDING ON NON-EXECUTION OF POWER OF DISPOSITION.

An executory devise cannot be made to depend on the non-execution by the first taker of an absolute beneficial disposing power vested in him by the will creating the limitation, and the fee vests in the first taker.

ACTION for ejectment.

The opinion states the facts.

A. J. Parker, for appellant.

Horace E. Smith, for respondent.

ANDREWS, J. The original plaintiff, Jane Van Horne, claimed title to the premises in controversy, under Henry V. Fonda, one of the sons of Jellis Fonda, who died seized of the premises in 1791, leaving a widow and two sons and three daughters surviving him. The title of Henry V. Fonda depended upon the validity of a devise over in the will of Jellis Fonda. Jellis Fonda, in his will, devised a parcel of land containing about fourteen acres, including the lot in question, to his wife Jannettie, for life, remainder to his son Douw, his heirs and assigns forever. He devised another parcel, under a similar limitation, to his son Henry V. In a subsequent clause of the will it was provided that "if either of my two sons shall die seized of the estate hereinbefore bequeathed, or any part thereof, without lawful issue, that then the estate of him so dying seized, hereby bequeathed, shall descend to the other of my sons, in which case the survivor shall pay to my said three daughters, each, the sum of \$100." Jannettie, the widow of the testator, died soon after her husband and prior to the year 1800. Douw Fonda, after the death of the testator, entered into possession of the fourteen acres devised to him, and died intestate in 1837, without issue, and without having con-

veyed or otherwise disposed of the land. The contingencies thereby happened upon which, by the terms of the will, the limitation over to his brother Henry V. was to take effect. The question is whether this ulterior limitation was valid, and vested the fee of the fourteen acres devised in the first instance to Douw Fonda, in his brother Henry upon the happening of the contingencies specified. If the limitation was valid, the plaintiff is entitled to recover; if invalid, he has no title, and cannot maintain the action.

Before proceeding to examine the authorities bearing upon the question, it is important to observe the terms of the devise, and the character of the contingencies upon which the limitation over is made to depend. The devise to the testator's son Douw in the first instance was of a remainder in fee, dependent upon the life-estate of the mother. The devise was to him and his heirs and assigns forever—words apt and sufficient to carry an absolute fee. The devise over was upon a double contingency: the death of Douw without issue and without having disposed of the property in his life-time. The latter contingency is not stated in express words. But the power of the primary devisee to dispose of the land by a conveyance taking effect in his life-time, and thereby defeat the ulterior limitation, is implied from the words limiting the gift over to the land or such part thereof as the primary devisee "shall die seized of." That these and similar words import an absolute power of disposition in the first taker has been frequently adjudged, and some of the cases on this point will hereafter be referred to. The devise may therefore be described in general terms as a devise to the testator's son Douw, in words importing an absolute fee, with superadded words conferring an absolute beneficial power of disposition of the whole subject of the devise, by conveyance executed in his life-time, and a limitation over in the event of his dying without issue and without having exercised the power of alienation. If the devise in question was a simple devise to the testator's son Douw, in words importing a fee, and a devise over to his brother Henry in the event of the death of Douw without issue at his death, it would have constituted a valid executory devise, according to the doctrine

finally settled by the Court of King's Bench in *Pells v. Brown* (Cro. Jac. 590), decided in 1619, and which has been uniformly followed in subsequent cases. In that case, as the will was construed, lands were devised to A. and his heirs, and if he died without issue living at his death, then to B. The devise to A. was in words importing a fee-simple, and according to the rules of the common law, prevailing in respect to conveyances *inter vivos*, no further limitation was permitted. The common law did not allow a remainder or other legal estate to be limited after a fee. The rule was founded upon the postulate that a conveyance of a fee was a conveyance of the whole estate, and that nothing was left upon which the limitation over could operate. Upon the assumption that a fee given in the first instance carried the entire and absolute interest in the land to the grantee, the common law rule that there could be no further limitation was logical and consistent, because where the whole is given, there can be nothing beyond that left to give. But under the statute of uses, and indeed before they were legalized by that statute, a species of limitations known as shifting or springing uses had been recognized, which permitted ulterior estates to be created; to arise upon the defeasance of prior estates in the same property contrary to the strict rules of the common law. The courts after the passage of the statute of wills (32 Hen. VIII), following the analogies furnished in conveyances to uses, and in support of the intention of the testator, gradually came to recognize the validity of limitations not permitted in conveyances at common law. In this desire to sustain the intention of a testator, originated the species of property limitations known as executory devises. There are traces of the doctrine that a fee limited after a fee may be good by way of executory devise, prior to the case of *Pells v. Brown*. But that case completely established the validity and indestructibility of that species of limitations, and it has ever since, as stated by Lord Kenyon in *Porter v. Bradley* (3 Term Rep. 145), been regarded as the foundation and, as it were, *magna charta* of this branch of the law." Since that time, executory devises limiting a fee after a fee, upon some contingency operating to defeat the estate of the first taker, as upon

his death without issue or other specified event, have become common forms of assurance. The common law doctrine of repugnancy between the two estates, which, as has been said, was perfectly rational upon the assumption upon which it proceeded, has given way to the more just and reasonable view, which regards the prior gift, although made in words which, standing alone, import an absolute estate, as restrained by the subsequent limitation and as conferring only a qualified estate.

This prior estate, although properly denominated a fee, because it may last forever, is nevertheless a base or determinable fee, because it is liable to be defeated by the happening of the contingency upon which it is limited. In other words, in such a case, as the limitation is construed, an absolute fee is not given to the first taker, but only a qualified and determinable one. But a reference to the devise contained in the will of Jellis Fonda discloses an element not contained in the will under consideration in *Pells v. Brown*. It is not a simple devise as in that case, to A. and his heirs, with a devise over on the death of A. without issue, but there is interposed between the primary and secondary limitation a disposing power, whereby the first taker was entitled to dispose of the whole fee for his own benefit, and thereby cut off and defeat the ulterior limitation; because it is evident that the testator, in conferring this power on his son Douw, was not providing for a disposition by him, subject to the limitation over to Henry, but for a disposition which would defeat and destroy it. It is hardly necessary to call attention to the radical difference in the situation of the ulterior devisee, effected by this power of disposition in the first taker, from the situation of the executory devisee in *Pells v. Brown* and similar cases. In cases of the latter class the right of the ulterior devisee cannot be cut off or divested by any act of the primary devisee. It is true that the secondary limitation depends upon a contingency which may never happen, and so no estate may ever rest thereunder; but whether it shall, or shall not, is not subject to the will of the first taker, but depends upon the event of life, or death, or other contingency, which in no reasonable sense are within his volition or control. On the other hand, where, as in the will in question,

in addition to words importing an absolute fee in the first taker, there is superadded a beneficial disposing power, authorizing him to convey an absolute fee, and thereby divest all rights in the secondary devisee and cut off the limitation over, the interest of the ulterior devisee, assuming that the limitation is valid, is reduced to scarcely more than a mere possibility. The power given to the first taker is conjoined with an interest in him to exercise the power and thereby defeat the subsequent estate. In any view the estate of the first taker is scarcely less than complete ownership, and the right of the ulterior devisee is, as has been said, scarcely more than a very remote possibility.

The precise question presented, therefore, for our determination, is, whether an executory devise can be made to depend on the non-execution by the first taker of an absolute beneficial disposing power, vested in him by the will creating the limitation, or in other words, whether there can be a valid executory devise where the executory limitation is conjoined with an absolute power in the primary devisee to defeat and cut off the future estate or interest by alienation of the entire fee in his life-time, and whether it makes any difference as to the rights of the ulterior devisee, whether the power has or has not been exercised. This question we may reasonably expect to find answered by the authorities, and, as we understand them, it is answered by an unbroken line of authorities in this State and the almost uniform course of decision elsewhere against the validity of such a limitation. If the limitation over was void the absolute fee to the fourteen acres vested, on the death of the testator, in his son Douw. Where a limitation over after a devise of a fee-simple is void for remoteness or other reason, the fee-simple stands as an absolute fee, as though no limitation over had been attempted. (Lewis' Perp. 657; 2 Wash. Real Prop. 360, and cases cited.) Another remark may properly be made before proceeding to examine the authorities. Executory devises are what the court have made them, and whether in a given case there is or is not a good executory devise, depends upon whether the devise conforms to the rules which the court have adopted regulating that species of limitation. This is

very clearly brought out in a striking passage from Mr. Hargrave (Harg. Jurid. Arg. 31). "Executory devises," says that eminent authority, "appear to be not a genuine branch of our law, but an indulged superinduction to it; not a regular production of our general system, but an excrescence; not a strictly regular species of entail, but a permitted regular mode of settlement; not a legitimate offspring of our common law, but a privilege gradually insinuated into our jurisprudence." The general rule sustains a limitation over after the devise of a fee on a contingency defeating the prior estate; but if it shall be found that the law of executory devises, as established by the courts, does not permit such a limitation over on a particular contingency, as, for example, where an absolute power of disposition is vested in the first taker, then the limitation over in that case is not a good executory devise, because it does not come within the rules regulating that species of limitation. The limitation over in the case supposed would be repugnant to the prior fee and the superadded power, not because there could not, in the nature of things, be a complete and perfect execution of the intention of the testator, for manifestly there is no necessary repugnancy in fact between a gift to A., with power of disposition, and a gift over to B. in case the power is not exercised. But such a gift over upon the assumption made is repugnant in law to the prior estate and power, because the law has declared that a valid limitation over cannot be made to depend upon such a contingency. The law in the case supposed defeats the intention of the testator. But this occurs in all cases where a testator undertakes to do what the law does not permit. The rule of perpetuities and our statute of uses and trusts furnish similar examples. Lord Langdale, referring to this principle in *Byng v. Lord Stafford* (5 Bea. 653), said: "The words are not rejected against the rule that every word in a will shall, if possible, have a meaning, but because the testator has attempted to do what the law will not permit, or has made dispositions of property which are inconsistent with each other."

The earliest case in the courts of this State, involving the question now presented, is *Jackson v. Bull* (10 Johns. 19), de-

cided in 1813. The action was ejectment. The plaintiff claimed title under the will of one Bull, whereby the testator devised the demanded premises to his son Moses, his heirs and assigns forever; and another parcel, by a similar devise, to his son Young; and then declared as follows: "In case my son Moses should die without lawful issue, the said property he died possessed of I will to my son Young," &c. After the death of the testator, Moses the son entered into possession of the property devised to him, and died in possession without issue, and by his last will devised the property to his wife, sister and half brother, under whom the plaintiff claimed title. The question was, whether the testator's son Moses took under the devise an absolute fee, thereby rendering the limitation over void. The cause was tried before Kent, Chief Justice, and a verdict was taken subject to the opinion of the court. The court in banc, in a *per curiam* opinion, in which all the judges concurred, held that the limitation over was void as being repugnant to the absolute ownership and power of disposition given to Moses by the will, and it was declared to be a settled principle that a "valid executory devise of real or personal property cannot be defeated at the will and pleasure of the first taker;" and also that the question did not turn upon the fact whether the devisee had exercised the power of alienation. The power of disposition in the testator's son Moses was implied from the words "died possessed of." The fact that Moses had himself devised the property was not referred to by the court, and was clearly immaterial. The language from which the power of disposition was implied manifestly confined the disposition to a conveyance by Moses, operating in his life-time. He would die possessed of the land in the absence of such a conveyance, notwithstanding he had devised it, and if the limitation over was valid, it would not be defeated by a testamentary disposition, because such a disposition was not within the power. The very close correspondence between the circumstances of that case, and the one now before us, cannot fail to attract attention. In both, the primary devise was in words appropriate to carry a fee; the limitation over in both

cases was on a double contingency of precisely the same character; that is, on the contingency of death without issue and without having disposed of the property, and in neither had the power of disposition been exercised. The case of *Jackson v. Bull* is a direct and explicit authority against the validity of the limitation over in the case before us. The next case involving the question arose upon the will of William Alexander, known as Lord Sterling, who died in 1783. By his will, dated in 1771, he devised, in words sufficient to carry the absolute property, all his estate, real and personal, to his wife Sarah; but in case of her death without disposing of such estate by will or otherwise, then all such estate, or all parts thereof as should remain unsold or undevised at her death, he devised to his daughter Catherine Duer. This, it will be observed, was a perfectly valid executory devise to Catherine, unless the limitation over was void by reason of the disposing power vested in the mother. Several cases are reported in Johnson, arising under this will. But the case of *Jackson v. Robins* (15 Johns. 169; s. c. 16 Id. 537) is the only one to which reference need be made. That was ejectment brought to recover lands in Ulster county, the plaintiff claiming title under the limitation over to Catherine, the daughter of Lord Sterling. The defendant relied upon two principal grounds of defense; first, that the limitation over in the will of Lord Sterling was void by reason of the power of disposition given to the mother; and second, a title by adverse possession. The case came before the Supreme Court on special verdict, and judgment was rendered for the defendant. It was carried to the Court of Errors and was there argued by some of the most eminent counsel in the State. The opinion was delivered by Chancellor Kent, adversely to the plaintiff, sustaining the defense on both grounds. The counsel for the plaintiff, at great length and with ability, assailed the correctness of the decision in *Jackson v. Bull*. The chancellor in his opinion re-examined the principles of that decision, and after an elaborate discussion and examination of the authorities, re-affirmed the doctrine of that case and declared that "there is not a case to be found in which a valid executory devise was

held to subsist under an absolute power of alienation in the first taker." The court concurred unanimously in the opinion of the chancellor, and the judgment was affirmed. Passing by the case of *Patterson v. Ellis* (11 Wend. 260) as not material to the discussion, except that Chief Justice Savage, in his opinion, cites and expressly approves the doctrine of *Jackson v. Bull*, we come next in order to the case of *Helmer v. Shoemaker* (22 Wend. 137). The plaintiff claimed certain land under an executory devise, the defendant under a deed from the first taker. By the will the land was devised to the testator's wife, without words of limitation, and it was then declared that "all the avails of the property that might remain" at her decease should go over. It was held, Cowen, J., writing the opinion, that the widow took an absolute fee by reason of the power of disposition. The title of the defendant might, perhaps, have been sustained on the deed from the widow, as an execution of the power of disposition, but no reference was made to this point, and the court disposed of the case on the doctrine of *Jackson v. Bull*. In *McDonald v. Walgrove* (1 Sandf. Ch. 274) a testator devised all his real estate to his wife, to be at her entire disposal, but if any part remained unsold at her death, he devised the same to his children and grandchildren. The will took effect before the Revised Statutes, and the widow died without having sold the property. It was held by the vice-chancellor that the wife took the entire fee-simple, and that the subsequent limitation was repugnant to the absolute gift, and was void. The learned judge touches very nearly the marrow of the question when he says: "Here the whole estate was made defeasible by the disposition of the property of the testator, and by consequence it cannot be deemed an executory devise." *Norris v. Beye* (13 N. Y. 273) was a case involving the construction of a will of personal estate, taking effect after the Revised Statutes. The testator, after bequeathing a personal fund in language denoting an absolute gift, provided that it should go over in the event of the first legatee dying under age and without issue. It was held in accordance with the settled law that the gift over was a valid executory bequest. Judge Denio, delivering the opinion of the court, dis-

tinguished the case from those in which the limitation over was preceded by an absolute power of disposition in the first taker, and said: "In such cases a further limitation was clearly hostile to the nature and intention of the gift." No reference was made by the learned judge to the provisions of the Revised Statutes, but the case was decided on common law principles. The case of *Trustees, &c. v. Kellog* (16 N. Y. 83) involved the validity of a legacy under a will which took effect in 1824. The testator devised his real and personal estate to his daughter Chloe, her heirs and assigns forever, and in the event of her dying without issue, he gave to the plaintiff a legacy of \$10,000. The testator by his will appointed a guardian for the daughter during her minority, and directed him to apply such part of the estate as he should deem necessary for her maintenance, education and support. It was claimed on behalf of the executors that the legacy was void for repugnancy to the prior gift to the daughter. The objection was overruled on the ground that the power of disposition was limited to a special purpose, and during a limited period, viz.: For the maintenance, education and support of the daughter during her minority, and, also, that from the amount of the estate the provision for the support of the daughter could not have been intended to interfere with the legacy to the plaintiff. Judge Denio, in his opinion, recognizes the rule that an absolute power of disposition would have rendered the legacy void. He says: "If it appeared that the testator intended to confer upon the first devisee an absolute power of disposition, and in his will he afterward made a gift over, the two dispositions cannot stand together. The absolute power of disposition shows that he intended to give an unqualified title to the first devisee, and it is in the nature of such a title that the property, if not alienated by the owner, shall descend to the heirs if it be real estate, or go to the next of kin if it be personal. The gift over is repugnant to this quality of absolute ownership, and it is consequently void." It will be noticed that Judge Denio regarded the rule stated as alike applicable to devises of real and personal property. *Tyson v. Blake* (22 N. Y. 563) was the case of an executory bequest with a limitation over on the death of the

primary legatee without issue, and is only important in the discussion as containing an express recognition of the doctrine of the prior cases, that a limitation over is incompatible with an absolute disposing power in the first taker. *Terry v. Wiggins* (47 N. Y. 512) was an action of ejectment, the title depending upon a devise in a will, which took effect in 1862, of certain land to the testator's wife, for "her own personal and independent use and maintenance," with power to sell the same, and a devise over after her death of any residue, &c. The court construed the will as giving the wife a life-estate only, with a limited power of disposition, and sustained the devise over on this ground. Allen, J., said: "The power of disposition is not absolute so as to bring it within the rule making all devises with absolute power of disposition in the devisee gifts in fee;" and he further said that if the devise to the wife had been a fee the claim that the devise over was repugnant and void would have been well founded. The learned judge also referred to certain provisions of the Revised Statutes, and remarked that it was not material to decide whether the limitation over was a good executory devise at common law. *Smith v. Van Ostrand* (64 N. Y. 278) involved the construction of a will which, as construed, gave to the testator's widow a sum of money during life or widowhood, with power to use so much of the principal as might be necessary for her support, with remainder to her children. The court sustained the validity of the gift in remainder on the ground that the power of disposition was not absolute, but limited and conditional. Judge Rapallo said: "The cases sustain the proposition that where an absolute power of disposal is given to the first legatee, a remainder over is void for repugnancy," and adds: "But they also recognize the principle that if the *jus disponendi* is conditional the remainder is not repugnant. The power of disposition in the present case is only for a special purpose—the support of the widow." *Campbell v. Beaumont* (91 N. Y. 464) was an action for the construction of a will of real and personal estate, which took effect in 1876. The principal question was whether there was a valid limitation over of the real and personal estate which, in the

first instance, was given to the wife of the testator. The alleged limitation over was of the property or such portion "as may remain," &c., after the decease of the wife. The court held that upon the construction of the whole will the fee in the real estate and the absolute interest in the personal property was given to the wife, and further, that if the intention of the testator was to limit the estate over the limitation was void as repugnant to the power of disposition. Danforth, J., said: "The gift appears absolute and entire in its terms; no child of the testator was to be provided for, and it better accords with the decisions in this State to hold that if a limitation over was attempted, it is repugnant and void," citing *Jackson v. Bull* (*supra*).

We have referred to all the cases which we have found in this State having a direct bearing upon the point under discussion. They unite, as with one voice, in declaring, as an undoubted principle of the common law, that a valid executory devise cannot co-exist with a devise of a primary fee, accompanied with an absolute disposing power in the first taker, and that an executory limitation by will, either of real or personal property, after a gift of an absolute estate, is void. An absolute power of disposition annexed to a primary devise in fee is deemed conclusive of the existence in the primary devisee of an absolute estate. Such of the cases as sustain a limitation over after a life-estate, accompanied with a limited power of disposition in the life-tenant, proceed upon a distinction perfectly well settled and fall within that common form of limitation, viz., a limitation for life, with power of appointment in the life-tenant, and remainder over on default of its exercise. The estate created by the exercise of the power does not take effect out of the interest of the life-tenant but out of the estate of the grantor of the power not embraced in the life-interest. (See *Bradley v. Westcott*, 13 Ves. 445.)

The decisions in other States upon this question are equally uniform. *Ide v. Ide* (5 Mass. 600), decided in 1809 by Chief Justice Parsons, is, perhaps, the earliest case in the country upon the subject. The action was ejectment. In that case the testator devised real estate to his son P., his heirs and assigns

forever, and also bequeathed to him personal estate in words denoting an absolute interest, and in a subsequent clause declared, "and further, it is my will that if my son P. shall die and leave no lawful issue, what estate he shall leave, to be divided between my son J. and my grandson N.," &c. P. conveyed the land in his life-time and died leaving no issue. The court held that the limitation over was void for repugnancy to the disposing power, and on that ground decided the case for the plaintiff, making no reference to the fact that P. had exercised the power by a conveyance. The power of disposition was held to be implied from the words "what estate he shall leave." *Nelson v. Doe* (4 Leigh, 408), decided by the Supreme Court of Virginia in 1833, was a case where a testator devised land to his son W. and his heirs, and if he should die without a son and not sell the land, then to the testator's son G. It was held, as stated in the head-note, that the devise gave W. absolute power to sell a fee-simple, and, therefore, whether he sold or not, he took a fee-simple and the devise over was void. The same principle was declared in a prior case in the same State (*Riddock v. Cohen*, 4 Rand. 547), where the power of disposition was held to be implied from the words "such of the estate as may remain undisposed of." *Cook v. Walker* (15 Ga. 459) involved the construction of a marriage settlement of real and personal property which provided for the devolution of the property if the wife "should die intestate without making any disposition," &c. Lumpkin, J., in delivering the opinion of the court, said: "We hold it to be an incontrovertible rule that whenever an estate is given in Georgia, either by deed or will, to a person generally or indefinitely, with an unlimited power of disposition annexed, it invariably vests an absolute fee in the first taker, and that neither a remainder nor an executory devise can be limited on such an estate." The cases of *Flynn v. Davis* (18 Ala. 132), and *McRae's Administrators v. Means* (24 Id. 350), declare the same rule. In *Pickering v. Langdon* (22 Me. 413) it was held that a gift over of real and personal estate, of "what remains" on the death of the first taker, was void; and in *Ramsdell v. Ramsdell* (21 Me. 288) it was declared that the doctrine of *Jackson v. Bull* (*supra*) was

the settled law. The doctrine that an absolute power of disposition in the first taker was fatal to a limitation over was also declared by the Court of North Carolina (1 Jones, 463), and also by the Courts of Tennessee in two cases — *Williams v. Jones* (2 Swan, 620), and *Davis v. Richardson* (10 Yerg. 290). After a somewhat diligent examination I have been unable to find any decision in any court in this country adverse to the doctrine declared in *Jackson v. Bull* (*supra*), and I think it may safely be affirmed that the doctrine of that case is the settled law of the American courts. I cannot better conclude this review of the American cases than by quoting the words of Chancellor Kent in his Commentaries, written long after the decisions in Johnson (*supra*), and after the close of his judicial life. Speaking of executory devises (4 Kent's Com. 270), after stating that a valid executory devise must be indestructible by the first devisee or taker, he adds: "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same; in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." (See, also, to same effect, 2 Wash. Real Prop. 669.)

The doctrine of *Jackson v. Bull* is assailed as contrary to the settled rule of the English courts, and as based upon a misconception of the case of *Att'y-Gen'l v. Hall* (Fitzg. 314), cited as authority for the decision, and upon a mistake of the court in applying to executory devises a rule applicable only to limitations of personal property. If the claim made was well founded it would furnish no reason for departing from a rule of property settled by repeated decisions in our courts, and which has become the foundation of legal titles. Many of the established rules of property limitation are technical, and in many instances were founded upon mistaken analogies or upon

reasons which no longer have any significance. But to depart from them in cases where rights have become vested and titles have been taken in reliance upon them would produce great inconvenience, and in many cases work gross injustice. But after an examination of the English cases I have reached the conclusion that the doctrine of *Jackson v. Bull* accords with the great weight of authority in England, and that the alleged distinction between executory testamentary limitations of real and personal estate has no foundation in English law, or at least that such a distinction has not been recognized from a time anterior to the case in Fitzgibbon, which was decided in 1731. In that case a testator owning real and personal estate gave it by will to his son F. H., and to the heirs of his body, and if he should die leaving no heirs, then he gave so much of the real and personal estate as the son should be possessed of at his death to charitable purposes. The question was, whether the limitation over of the personal property was good. The court, as the case states, "unanimously held that the absolute ownership had been given to F. H., for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore he had power to dispose of the whole," and the limitation over was held to be void. The case was referred to and approved by Lord Hardwick in *Flanders v. Clark* (1 Ves. Sr. 9), who said: "It was insisted in *Attorney-General v. Hall* (Fitz.) that he, F. H., had only a usufructuary interest, and so to go over, but it was determined by Lord King that he had the absolute property, and, therefore, the devise was void, for he had the power to spend the whole, which was an absolute gift." It will be noticed that Lord Hardwick understood the case as holding that the gift was absolute, because of the power of disposition. It accords with logic as well as law, that where a gift of real or personal property is in law absolute, there can be no valid ulterior limitation engrafted upon it. Executory devises of a fee limited after a fee were sustained, as I have said, upon the ground that, construing the whole limitation together, the first fee was a qualified and not an absolute interest.

In the early period of the law, as is well known, future es-

tates in personal property were not permitted. It was originally held that a gift of personalty for life was an absolute gift, so as to invalidate any further limitations (7 Roll. Abr. 610); then a distinction was raised between the gift of the thing itself, and a bequest for the use only for life (Plowd. 521; Cro. Jac. 346); but this distinction was finally laid in *Hyde v. Barrat* (1 P. Wms. 2), and for more than a century and a half, executory bequests of personal property have been permitted by the law of England, under the same rules of limitation as apply to executory devises of land. It will avoid confusion to refer to one distinction between limitations of real and personal property, founded upon a peculiar reason, and which is an exception to the general rule of uniformity of construction. It was settled at a very early period in the law, that words of limitation that give an estate tail in land give an absolute interest in personal property. This distinction was indulged in order to prevent the creation of perpetuities in limitations of personal property. The statute *de bonis*, which was the foundation of estates tail, applied only to land. In their origin these estates were perpetuities, because they could not be alienated out of line of the entail. The courts, to defeat the design of the great lords in enacting the statute, invented the processes of fines and common recoveries as a means of unfettering these entails. But limitations of personal property in the nature of estates tail in land could not be barred by fine or common recovery, and unless cut off and held to be invalid, would lead to perpetuities in that species of property. And to prevent this, the limitation to issue was held to take an absolute interest, free from the limitation over. (*Bradhurst v. Bradhurst*, 1 Pai. 331-345; Roper's Leg. 1522.) Executory devises were also exempt from the operation of fines and common recoveries, because the fiction of compensation to the issue in tail, upon which those proceedings were founded, was inapplicable to that species of limitations; but they were prevented from becoming perpetuities by the rules established by the courts that, in order to be valid, they must be limited on a contingency which must happen within the period prescribed for the vesting of future estates. The doctrine of executory devises in its origin had

reference to real property; but from a very early period in the law, and prior to the case in *Fitzgibbon* (*supra*), executory bequests of a future interest in personal property, to take effect on a contingency defeating a prior bequest, made in words denoting a gift of an absolute estate in the first taker, were recognized as valid, and I am unable to find any trace in recent times of any distinction between the two species of limitation, or any case which holds that a limitation bad as to one species of property is good as to the other, or conversely. The very early case reported in 2 Freem. Ch. 137, decided in 1672, expressly affirmed the validity of an executory bequest of personal property after words of absolute gift, to take effect on a contingency defeating the prior estate. The case was a bequest of £500 to the testator's daughter, and if she died under thirty years of age, unmarried, then over. She received the money and died before the time. It was held that her executors were chargeable as possessed in trust for the legatees over. This indeed, says Fearn, p. 404, was not the case of a devise to one for life or a particular period, and afterward to another, but a conditional new disposition of the property upon a particular contingency. There are many other English cases sustaining an executory bequest of the same character. (*Atkinson v. Hutchinson*, 3 P. Wms. 258; *Wilkinson v. South*, 7 Term R. 555; *Stone v. Maule*, 2 Sim. 490.) The doctrine that personalty may be bequeathed under the same limitations as realty, and that the validity of executory bequests depends upon the same rules as govern executory devises, is affirmed by the text-writers, and, so far as I know, without dissent. (Lewis' Perp. 99; Smith's Exec. Int. 312; Roper's Leg. 1546; Fearn's Rem., Mr. Butler's note E, p. 401.) Upon the authorities the claim that the case in *Fitzgibbon* proceeded upon any distinction known to the law between an absolute bequest of personal property with a superadded power of disposition in the first taker, and an executory devise of the same character, cannot be supported. The rule that a gift over of personal property by will, after a prior general gift accompanied with an absolute disposing power in the first taker is void for repugnancy, was held in *Bull v. Kingston* (1 Mer. 314), and in *Ross v. Ross* (1 Jac. & W. 154).

They go upon the general principle and not upon any distinction between real and personal property. The case last cited was of a legacy to A., to be paid at twenty-five, with a limitation over if A. should not receive or dispose of it by will in his life-time, and the limitation over was held to be void for repugnancy. Sir Thomas Plumer, M. R., said: "I do not recollect any instance of a will where an absolute property is first given with a condition that if a party does not make use of it, it goes over," and referring to the case before him, he said: "It is quite a novel attempt to separate the devolution of property from the property itself."

There is a single case in England which sustains the contention of the plaintiff. In *Doe v. Glover* (C. B. 448), decided in 1845, a testator devised lands to his son, his heirs and assigns forever, but in case his son "should depart this life without leaving any issue of his body then living," and shall not have "disposed of or parted with his interest in said lands," then over. The son died without issue and without having disposed of the land in his life-time, but left a will devising the property. The question considered in the opinion was whether the will was a good execution of the disposing power. The court decided that it was not, and having reached this conclusion, held that the limitation over took effect, without advert- ing to the question whether there was any repugnancy between the limitation over and the disposing power.

In *Beachcroft v. Broome* (4 Term Rep. 441) is a dictum by Lord Kenyon, also supporting the plaintiff's position. The case of *Doe v. Glover* is the only case in England which we have been able to find involving the question, which sustains a limitation over after a devise in fee accompanied with an absolute power of disposition in the primary devisee. But as early as 1746, in the case of *Gulliver v. Vaux*, a report of which was found among Sergeant Hill's manuscripts, and which is printed in an appendix to the case of *Holmes v. Godson* (8 DeG., Mac. & G. 152), it was held that a limitation over of real estate after a fee, on the contingency of the death of the first taker without issue and "without appointing the disposition of the estate," was not a good executory devise by reason of its repug-

nancy to the disposing power. The case was decided by Willes, Ch. J., and his associates, and is declared by Lord Justice Turner, in *Holmes v. Godson*, to be of the highest authority. The case of *Holmes v. Godson*, which was decided on appeal in chancery in 1856, is a precise authority in support of the doctrine of *Jackson v. Bull* (*supra*). That was the case of a devise of real and personal estate in trust for the testator's son, with a proviso that if he should die under twenty-one, or without having made a will, then over. The plaintiffs claimed under a conveyance of the real estate from the son, and the defendants under the limitation over, the son having died after he had attained the age of twenty-one without making a will. The court held that the limitation over was void for repugnancy, Lord Justice Turner saying: "This is in terms a disposition of real estate in favor of other devisees, in the event of the primary devisee dying intestate, and I think such a disposition is repugnant and void." After referring to decisions relating to personal property, he said: "It was objected to these cases that they all referred to personal estate. But upon this question I confess myself unable to see the distinction between cases relating to personal property and cases relating to real estate," and then, after referring to *Gulliver v. Vaux* and other cases, he continued: "All these are cases of real estate, and they seem clearly to prove that upon this point there is no distinction between the cases relating to real and personal estate. In truth the decisions in both cases turn, as I apprehended, on this: The law has said that if a man dies intestate the real estate shall go to the heir and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law and, therefore, void." And then, referring to *Doe v. Glover* (*supra*), and to the fact that the point of repugnancy was not brought to the attention of the court, he said: "If the case of *Doe v. Glover* is to be considered as conflicting with the other authorities, I think that the other authorities, and especially the case of *Gulliver v. Vaux*, ought to prevail against it." Lord Justice Bruce also delivered an opinion to the same effect. The

case *In re Stringer, &c.* (6 Chan. Div. 1; s. c. 22 Moak's Eng. R. 602), arose upon a will in which the testator gave to J. his real and personal estate, with full power to sell and dispose thereof, by deed or will, with a gift over in case J. should make no disposition of the property. J. died in the life-time of the testator. It was held at the hearing, by Sir George Jessel, M. R., that the gift over was void for repugnancy. The decision was reversed on appeal on two grounds; first, that as the first gift failed by the death of the primary devisee before the death of the testator, the second devise took effect as a primary limitation; and second, that on the whole will the intention was that the testator should have only a life-estate. But the judges expressly recognize and affirm the doctrine that a limitation over after a fee, with an absolute power of disposition in the first taker, would be void. James, L. J., said: "It is settled by authority that if you give a man some property, real or personal, to be his own absolutely, that you cannot by your will dispose of that property which becomes his. You cannot say that if he does not spend it, or if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket, at the time of his death, shall not go to his heirs at law, if it be realty, or to his next of kin, if it be personalty." (See, also, *Shaw v. Ford*, 7 Chan. Div. 78; s. c. 23 Moak's Eng. R. 796.) The authorities cited sustain, I think, the main proposition of this opinion, that according to the uniform course of decision in this country and the great weight of authority in England, a valid executory devise cannot at common law be limited after a fee upon the contingency of the non-execution of an absolute disposing power vested in the first taker, and that such a limitation over is void in its creation. I have not referred to the provisions of the Revised Statutes. If these provisions (1 Rev. Stat. 725, §§ 32, 33) have changed the common law, a point which we do not now decide, they cannot affect the disposition of this case. The rights under the will of Jellis Fonda became fixed upon his death in 1791, and must be adjudged according to the rules of the common law.

I have considered the case upon the assumption that the

right of the plaintiff rested solely upon the will of Jellis Fonda, and have made no reference to the claim made on the argument, so far as appears, for the first time that, admitting that the testator's son Douw took an absolute fee in the fourteen acres under the will, yet, upon his death, his brother Henry took an interest in the land as one of his heirs at law, which became vested in his children upon his death. It is unnecessary to consider this aspect of the case, as the defendant, if the order of the General Term is affirmed, is entitled to judgment absolute upon the plaintiff's stipulation.

I close this too protracted discussion. It may find some excuse in the desire to vindicate the doctrine of *Jackson v. Bull*, and the cases in this State which have followed it, from the claim persistently urged, but, as I think, without foundation, that the doctrine was a departure from the established law.

The order of the General Term should be affirmed, and judgment absolute directed for the defendant.

All concur, except RUGER, Ch. J., dissenting.

BETTS vs. HARPER.

[39 Ohio State, 639.]

JOINT WILL BY TENANTS IN COMMON.

Tenants in common may dispose of their estates by a joint will.

PROCEEDINGS to set aside probate of will.

The following document was executed by Agnes and Penrose Harper, and probated in 1875, the former having died in 1872 and the latter in 1874 :

"We, Agnes Harper and Penrose Harper, of the county of

Hocking, in the State of Ohio, do make and publish this our last will and testament, in manner and form following, that is to say: First, it is our will that our funeral expenses and all our just debts be first fully paid; secondly, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever; lastly, we hereby constitute and appoint James Betts to be executor of this our last will and testament, revoking and annulling all former wills by us made, and ratifying and confirming this, and no other, to be our last will and testament."

M. A. Daugherty and *J. R. Grogan*, for plaintiffs in error.

J. H. Collins, for defendant in error.

OKEY, J. The construction placed by the majority of the court, in *Walker v. Walker* (14 Ohio St. 157), on the instrument there in question, viewed in the light of the facts existing at the time of its execution, was that the alleged will should be regarded as simply a compact, joint in form and substance, between Walker and his wife, to treat their several estates as one estate, and jointly dispose of it as such among the objects of their bounty; that it was a matter of negotiation between them and the disposition which each made of his or her property was influenced and modified by the disposition made of the property of the other; that each devise and bequest was, in fact, made in consideration of each and all the rest; and that it was part of the compact that neither of the parties should revoke or cancel the instrument, or any part of it, without the consent of the other. Moreover, subsequently to the death of Mrs. Walker, Walker, in violation of the agreement, conveyed to others portions of his land so devised. The majority held that the instrument was not valid as a will; and that the remedy of the devisees and legatees, if they had any, was in equity to enforce the agreement.

Assuming, as we should—more than twenty years having elapsed since the case was decided—that the instrument re-

ceived the proper construction, we are not disposed to question the decision. But it is said, in the opinion, that the policy of the State, as indicated in our legislation, is opposed to joint wills; and attention is directed to the language of the Wills Act, which it is said plainly refers to an instrument to be executed by one person only. It will be seen, however, that our statute is not peculiar in this respect. The provisions of the English statutes and the statutes of the various States, upon the subject, are precisely similar to our own; and the conclusion that they indicate a policy that two or more persons may not unite in the same instrument in making their wills, whatever the form of the instrument may be, is only reached by a rigid, and, as we think, altogether unwarranted adherence to the mere letter of the statute. The provisions of the statute relating to the execution of deeds are similar, and yet nobody has ever doubted that any number of persons having an interest in property can join in an instrument conveying it.

The case before us is unlike *Walker v. Walker*. Agnes Harper and Penrose Harper were each the owner of personal property, and they were owners, as tenants in common, of real estate. Each desired to bequeath her personal property to James Betts and John D. Betts, and each desired to devise to them her undivided share of the real estate. They could unquestionably have done this by two instruments, but they could do it as effectually by one. This instrument was, in effect, the separate will of each. Either could have revoked it, so far as it was her will. On the death of Agnes, in 1872, the instrument might have been admitted to probate as her will; and in 1874 it might have been admitted to probate as the will of Penrose; but in 1875 it was properly admitted to probate as the will of both. The authorities, it will be seen, are in some conflict, but the view we have stated is supported by reason and the manifest weight of authority. (*Exp. Day*, 1 Bradf. 481; *Diez's Will*, 50 N. Y. 88; *Mosser v. Mosser*, 32 Ala. 551; *Schumaker v. Schmidt*, 44 Ala. 454; *Wyche v. Clapp*, 43 Texas, 544; *March v. Huyter*, 50 Texas, 243; *Breathitt v. Whittaker*, 8 B. Monroe, 530; *Lewis v. Scofield*,

26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; *Re Stracey*, 1 D. & S. 6; 1 Jur. N. S. 1177; *Re Raine*, 1 S. & T. 144; *Re Lovegrove*, 2 S. & T. 453; 8 Jur. N. S. 442; and see *Denyssen v. Mostert*, 4 L. R. P. C. 236; 8 Moore's P. C. N. S. 502; *Gould v. Mansfield*, 103 Mass. 408; cf. *Clayton v. Liverman*, 2 Dev. & Bat. 558; *Hershy v. Clark*, 35 Ark. 17, 23.)

Judgment reversed.

TOWNSEND'S APPEAL.

[106 Pennsylvania State, 268.]

INTEREST ON LEGACY FOR MAINTENANCE.

A pecuniary legacy by one *in loco parentis* for the maintenance of the legatee, bears interest from the testator's death.

PROCEEDINGS for distribution of estate.

J. Cooke Longstreth, for appellants.

George P. Rich and *Mayer Sulzberger*, for appellees.

STERRETT, J. After ordering her executors to sell at public or private sale, according to the best of their judgment and discretion, all her real estate, and authorizing them, in like manner, to sell, assign and transfer all or any part of her personal property, the testatrix directed them, out of the proceeds, to pay over to trustees, one of whom was also an executor, the sum of \$24,000, in trust to invest the same "in good, safe interest bearing securities, and the same to sell and change from time to time as they may see fit, and to collect and receive the interest, dividends and income thereof, and the same either

to pay over to, or apply and appropriate to and for the maintenance, education and support of" the appellees, children of her deceased niece, "in equal shares and proportions for and during their respective natural lives, and with authority to pay the same to the guardians of such as are minors," etc. She further authorized her executors, in payment of this and other legacies, to transfer securities and investments belonging to her estate. At the time of her decease, testatrix owned interest bearing securities and investments ample for that purpose; and, in payment of the legacy, appellants transferred a portion of these securities, on which interest had accrued during the year next after her decease, and was received by them. Claiming that the appellees were not entitled to interest on the legacy during that period, the appellants retained for the benefit of the residuary estate, the interest thus collected by them on the securities transferred to the trustees; and thus arose the paramount question in the case, viz., whether the legacy in trust for the maintenance, education and support of the *cestuis que trustent*, bears interest from the decease of testatrix or only from the expiration of a year thereafter. On the authority of *Hilyard's Estate* (5 W. & S. 30), and kindred cases, the learned president of the Orphans' Court sustained the contention of the appellees, and in this we think he was right. The general rule undoubtedly is that pecuniary legacies are not payable until a year after the testator's death, and in the meantime do not bear interest, but to this there are some well recognized exceptions, such as a legacy by a parent to his child, or by one *in loco parentis*, by way of maintenance, where the possession of the principal is deferred; a legacy to a widow in lieu of dower, where no other means for her support is provided, and also where interest in the nature of an annuity is given, if by implication from the terms of the instrument, the legacy is given for support. (*Cooke v. Meeker*, 36 N. Y. 15.) In this case it is said, when a sum is left in trust with direction that the interest and income shall be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's decease, especially when it appears to have been the intent of the testator that the legacy should be

paid by a transfer of securities bearing interest at the time of his death. Under such circumstances, all the authorities concur in holding that the accruing interest upon the securities, from the time of testator's death, should go to the use and maintenance of the beneficiary. In the case before us, the clearly expressed intention of the testatrix was to provide maintenance, education and support for the children of her deceased niece, and there appears to be no reason why it should not be carried out. It is no answer to say they are too remotely related to her. There is nothing to prevent a testator from providing for the maintenance and education of strangers to his blood, whether they be infants or adults. If his intention so to do is clearly and unequivocally expressed it should be respected. We have no doubt it was the intention of the testatrix in this case that her beneficiaries should enjoy the benefit of the means provided for their maintenance and education, immediately upon her decease, and not be postponed for a year or two thereafter; and, upon that ground, if no other, the decision of the court below, as to the question of interest, should be sustained.

The appellees are not concluded by the confirmation of the executors' account or distribution of the small balance then in their hands. The claim that is now urged was not then presented nor passed upon in that proceeding. Nor are they concluded by the dismissal of their petition for review. That was expressly done without prejudice to their rights, if any they had, in another form of proceeding.

The entire estate of testatrix, both real and personal, was made a fund for payment of the legacy in question. The former was not sold by the executors, for the reason that they as residuary legatees elected, as they had a right to do, to take the land instead of the proceeds thereof, but that did not relieve the real estate in their hands from the burden imposed upon it by testatrix.

Having rightly sustained the claim of appellees to interest on the legacy, from the date of testatrix's decease, the learned judge was clearly right as to the proper mode of enforcing payment. The petition, it is true, was informal and irregular, but it was amendable, and he had a right to treat it as amended.

There appears to be no error in the decree, or in any of the proceedings leading thereto, that requires correction.

Decree affirmed and appeal dismissed at the costs of appellants.

See Howard v. Francis, 1 Am. Prob. R. 321.

SIMPSON vs. SIMPSON.

[Supreme Court of Illinois, September, 1885; 2 Northeastern Reporter, 258.]

ADVANCEMENT TO PARENT A BAR TO CLAIM OF HIS CHILDREN.

The acceptance by a child of an advancement in full of his share in his parent's estate bars him, and, in the event of his death intestate, his children also, from any claim thereon.

PROCEEDING to test validity of a release.

E. F. Runyan, for appellants.

H. F. Vallette, for appellee.

SHELDON, J. This is an appeal from a judgment of the appellate court of the first district, reversing a decree of the Superior Court of Cook county. The case was submitted to the appellate court upon the following agreed state of facts:

That John Simpson, Sr., departed this life intestate December 3, 1880, leaving him surviving his widow and John Simpson, Jr., Andrew Simpson, George Simpson, and Charles Simpson, his sons, and Rhoda Cox and Margaret Hammond, his daughters; that Amos P. Simpson, another son, died Sep-

tember 24, 1880, leaving him surviving Asa H. Simpson, Ida M. Simpson, and Burnell Simpson, his children and only heirs at law; that Mary Pratt, another daughter of John Simpson, Sr., died during the lifetime of her father, leaving her surviving two daughters, Elizabeth Pratt and Frances Pratt, her only heirs at law. John Simpson, Sr., at the time of his death, owned and possessed real estate and personal property, and an administration upon his estate was had in the probate court of Cook county, Illinois. In his lifetime he conveyed to John Simpson, Jr., certain real estate and received back from him a release substantially like the one hereinafter set forth. He also conveyed to his sons Andrew Simpson and George Simpson certain real estate, with an express agreement between himself and them that the same was to be received by them in full of their respective shares of his estate. He also conveyed to Amos P. Simpson the land described in the following release, and the latter thereupon executed and delivered to his father said release in the words and figures following:

"In consideration of the conveyance to me this day of the W. $\frac{1}{4}$ E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and 60 rods in width taken from the E. side of the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section number nine, 37 N., of R. 13 E. of the third principal meridian, in Cook county, Ill., by John Simpson, my father, and Elsie Simpson, his wife, I do hereby release all claim and right which I have or may hereafter have or acquire as heir of said John Simpson in all his estate, real and personal, in favor of the other heirs of said estate, except John Simpson, Jr., who has received his portion of said estate in the same manner as I have; the conveyance to me of said premises, as aforesaid, being intended by my father and accepted by me in full satisfaction of all my interest in his estate.

"Witness my hand and seal this twenty-ninth day of January, A. D. 1855. AMOS P. SIMPSON." [Seal.]

It is further stipulated that the only question presented by this appeal is whether the release above set forth is legally sufficient to bar said Asa H. Simpson, Ida M. Simpson, and Burnell Simpson from having any share or interest in the estate of

their grandfather, John Simpson, Sr. The Superior Court decided that question in the affirmative, and on the appeal of Asa H. Simpson, Ida M. Simpson and Burnell Simpson, the appellate court reversed the decree of the Superior Court.

It is well settled by the decisions of this court that if Amos P. Simpson, the son of John Simpson, Sr., deceased, were now in life, he would himself, as heir, be barred of all claim and interest in his father's estate, from the acceptance by him from his father of a conveyance of real estate in full satisfaction of his share as heir in his father's estate. (*Parsons v. Ely*, 45 Ill. 232; *Bishop v. Davenport*, 58 Ill. 105; *Galbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307.) Are the children and heirs of Amos P. Simpson in like manner barred, he having died in the lifetime of his father, John Simpson, Sr.? By our statute of descent the estate of a person dying intestate descends "to his or her children and their descendants in equal parts; the descendants of a deceased child or grandchild taking the share of their deceased parents in equal parts among them." The latter clause is but the enactment of Blackstone's fourth clause of descents, "that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. * * * And these representatives shall take neither more nor less, but just so much as their principals would have done. * * * This taking by representation is called succession *in stirpes*, according to the roots, since all the branches inherit the same share that their root, whom they represent, would have done." (2 Bl. Comm. 216, 217.)

Question might be made, as Amos P. Simpson had received full satisfaction of and given acquittance for his share in his father's estate, whether, within the language of the statute, there was any share of the deceased parent, Amos P. Simpson, for his children to take. Without dwelling upon this, we pass to other considerations.

At the time Amos P. Simpson received from his father this conveyance of real estate in satisfaction of his share in the father's estate, there was this provision of the statute upon the

subject of advancement: "Where any of the children of a person dying intestate, or their issue, shall have received from such intestate in his or her lifetime any real or personal estate by way of advancement, and shall desire to come into the partition or distribution of such estate with the other parceners or distributees, such advancement, both of real and personal estate, shall be brought into *hotchpot* with the whole estate, real and personal, of such intestate; and every person so returning such advancement as aforesaid shall thereupon be entitled to his or her just proportion of said estate." (Rev. St. 1845, p. 546, § 51.) This provision contains a clear implication that when there has been an advancement it shall debar sharing in the partition or distribution of an estate unless the advancement be returned. There appears here no offer of a return of the advancement. Under a Massachusetts statute, where there had been advancements made they should be taken into consideration, and be deducted from the shares of the persons advanced in the partitioning of intestate estate. It was held in *Quarles v. Quarles* (4 Mass. 680) and *Kenney v. Tucker* (8 Mass. 143), where a son received from his father a deed of real estate in satisfaction of his share in his father's estate, and the son died in the lifetime of the father, and afterwards the father died intestate, that it was an advancement to the son in full, and that the children of the son were barred from any share in the grandfather's estate. But we have a statute that went in force July 1, 1872 (Laws 1871-72, p. 352), which, by express enactment, meets the precise case at bar. Section 4 of the act is: "Any real or personal estate given by an intestate in his lifetime as an advancement to any child or lineal descendant shall be considered as part of the intestate's estate, so far as it regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate, but he shall not be required to refund any part thereof, although it exceeds his share." Section 5 provides that if the advancement is in real estate, and its value is expressed in the conveyance, or in the written acknowledgment thereof, by the party receiving it, it shall be considered as of that value in the distribution of

the estate, otherwise it shall be estimated according to its value when given. And section 8 is: "If a child or other descendant so advanced dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them." This last section makes the representatives of a person advanced to be affected by the advancement in the same manner as if the advancement had been made directly to them. So that the children of Amos P. Simpson would, under this statute, be barred in like manner as he himself would be were he now living.

It is objected that this statute does not apply, because the advancement was made to Amos P. Simpson, January 29, 1855, and that the legal effect of the advancement must be determined by the statute in force at the time it was made. But why so? The statute, in allowing its operation here, in nowise affects to their injury the rights of Amos P. Simpson or his father in respect of the advancement which had been made, nor the contract which they had made. It was their contract that this land, conveyed by the father to the son, should be in full satisfaction of the son's share in the father's estate. Their purpose was that neither the son nor his children should have any further interest in the father's estate, and that the remainder of the father's estate should all go to the other children unprovided for. The intent was that this share of the estate should be extinguished as to all claimants. The statute provision, that the son's children should be bound by the advancement received in the same manner as the son, was in aid of the contract between the father and son in giving it the precise effect which they intended. No rights of the son's children, he being then living, were affected by the passage of the act with its application to advancements heretofore made. Such children had, then, in their father's lifetime, no rights to be affected.

It was entirely competent for the legislature, as respects any

rights of appellees, to have enacted at that time that grandchildren should not inherit at all from grandparents; and it surely was not only unobjectionable, but highly proper, legislation that where a son had, by contract, received an advancement in full of his share in his father's estate, the children of the son, equally with himself, should be barred from inheritance in such estate. The statute is not in terms made in any way prospective in its operation to relate to cases of advancement thereafter to be made, but it is enacted for the case of "any real or personal estate given by an intestate in his lifetime as an advancement." When the grandfather here came to his death intestate, there was presented the case, under the statute, where a child who had been advanced by the intestate in his lifetime had died before the intestate, leaving issue; and we are of opinion the statute had operation, as to such issue, without regard to the fact whether the time of making the advancement was before or subsequent to the passage of the statute. The statute had respect to the amount lessening it which grandchildren in a certain condition, where an advancement had been made, should inherit from grandparents, and was operative, we think, with respect to all grandchildren whom it found under such condition as named in the statute at the time it was passed. The statute operated upon the existing state and condition of appellees at the time of the grandfather's death, and in so doing had no objectionable retroactive effect.

This is the reasonable construction in accordance with the terms of the statute, injurious to no existing rights at the time of the passage of the act, and the one which justice requires should be adopted. It is claimed, further, that this court has decided that such a transaction as that between John Simpson, Sr., and Amos P. Simpson, is not an advancement, and reference is made to *Bishop v. Davenport* and *Kershaw v. Kershaw* (*supra*) as so deciding. This is a misapprehension of those decisions. The question in those cases was whether children who had received property under such an express contract as in this case could, in disregard of their contracts, bring into *hotchpot* what they had received, and come in and share in

the distribution of the estate. And it was held they could not; that those were not such cases of advancement under the statute that the children who had thus received property upon an express contract that it should be in full satisfaction of their shares in their father's estate could, after the death of the father intestate, bring what they had received into *hotchpot*, and claim the right to share in the distribution of his estate; that they were barred by the express contract which they had made from all share in the estate. This was all that was, in fact, decided in those cases, or intended to be decided. There are not in the present case, as in the former ones, persons claiming to share in an estate in opposition to their express contract, by which they had received property in full satisfaction of their shares in the estate.

The conveyance of land which Amos P. Simpson received from his father was, in truth, an advancement—something received from his father in anticipation of what he might receive by inheritance—differing from a simple advancement in that it was an advancement in full, made such by the superadded express contract of the parties. As against the children of Amos P. Simpson, in order that they may be brought within the operation of this section 8 of the statute, we can have no doubt that what he thus received from his father should be regarded as an advancement, and that this is not inconsistent with any former holding of this court.

We are of opinion the Superior Court decreed rightly, and the judgment of the appellate court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

MULKEY, J. While I concur in all that is said in the opinion in this case, I go further, and hold that, notwithstanding the father of the grandchildren died before the intestate, the grandchildren must nevertheless take, if they take at all, *per stirpes*, and consequently their supposed rights are not and cannot be superior to those of the father if he were living. As it is conceded, if the father were now claiming instead of his children, he would have no standing in court, it follows the

situation of the latter is no better. The conclusion, then, to me seems irresistible, that the statute relating to the subject is merely declaratory of the common law, and that in no view of the case the grandchildren are not entitled to participate in the proceeds of the estate.

SCOTT, J. I do not concur in this decision.

MATTER OF WILL OF COTTRELL.

[95 New York, 329.]

ATTESTATION CLAUSE.—CONTRADICTED BY SUBSCRIBING WITNESSES.

An attestation clause signed by the witnesses and corroborated by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of execution, or other competent evidence, is sufficient to establish a will against the positive evidence of the attesting witnesses to the contrary.

PROCEEDING to probate a will.

James Lansing, for appellants.

Robert H. McClellan, for respondents.

RUGER, Ch. J. In reviewing questions arising on appeals from surrogates' courts in cases commenced therein previous to September 1, 1880, when the last seven chapters of the Code of Civil Procedure went into effect, we are precluded by section 1337 of that Code from re-examining the conclusions of fact reached by the court below, except in cases where the Supreme Court has reversed their judgments upon

such questions, and so certify in their order of reversal. (See § 1338.)

Previous to the adoption of that section appeals from the decrees of surrogates, brought up for review by the appellate tribunals, all of the questions, whether of fact or law, which were determined in the court of original jurisdiction.

Such appeals are now to be determined in this court solely upon the questions of law presented, except in the special case referred to. (*In the Matter of Ross*, 87 N. Y. 514; *Davis v. Clark*, Id. 623.)

In these, as in other appeals to this court, however, we look into the evidence given on the trial only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the trial court, and if we find such evidence, we are concluded by its findings.

The Code of Civil Procedure has also put, in the form of a statutory enactment, a rule in relation to the proof necessary to show the valid execution of a will which had indeed before then been well settled, but had previously existed by force of adjudication alone, viz.: That the due execution of a will might be established by competent evidence, even against the positive testimony of the subscribing witnesses thereto.

So much of section 2620 as is material to the point under discussion reads as follows: "If such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, the will may, nevertheless, be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action."

Although the occasions in which all of the subscribing witnesses testified positively against the due execution of a will have been infrequent of late years, a number of such instances are reported among the earlier English cases which have been cited with approval in recent cases in our courts. Those cases are collated and commented upon in the case of *Tarrant v. Ware*, by Judge Denio, reported as a note to the case of *Trustees of Auburn Seminary v. Calhoun* (25 N. Y. 425). After reviewing the English authorities and referring to the

evidence of subscribing witnesses, he says: "My purpose is to show that whether their denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported." It was said by Judge Gould in *Trustees of Auburn Seminary v. Calhoun* (*supra*): "It is too late to claim that the facts making due execution must *all or any of them* be established by the concurring testimony of the two subscribing witnesses. Both of those witnesses must be examined, but the will may be established even in direct opposition to the testimony of both of them." The principle here stated was approved in *Rugg v. Rugg* (83 N. Y. 594). In the case of *Lewis v. Lewis* (11 Id. 224) it was said by Judge Allen: "The *onus* of showing a compliance with the statute devolves upon the party seeking to establish the will, but the formal execution and publication may be shown by persons other than the subscribing witnesses, *or inferred from circumstances* as well as established by the direct and positive evidence of the attesting witnesses. It cannot, however, be presumed in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were done which are required to be done to make the instrument valid as a will." In *Jauncey v. Thorne* (2 Barb. Ch. 59) Chancellor Walworth states the rule to be: "A will may, therefore, be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses, who either mistakenly or corruptly swear that the formalities required by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary was the fact." To similar effect is *Chaffee v. Baptist Missionary Convention*, 10 Paige, 91. In *Orser v. Orser* (24 N. Y. 52) Judge Selden says: "A will duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear from recollection that the formalities required by the statute were complied with; and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were."

The precise force which should be accorded to a full attestation clause regularly authenticated is not very clearly defined in the cases, but they all agree in the conclusion that it is entitled to great weight in the determination of the question of fact involved. (*Blake v. Knight*, 3 Curteis, 547; *Orser v. Orser*, 24 N. Y. 55.)

A regular attestation clause, shown to have been signed by the witnesses and corroborated either by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of due execution or other competent evidence, has been held in many other cases, as well as those already cited, to be sufficient to establish a will signed by the testator, even against the positive evidence of the attesting witnesses to the contrary.

We have been cited by the appellant's counsel to a number of cases in which the courts have refused probate to wills where it did not affirmatively appear that the necessary conditions had been performed, or upon the evidence of one or more of the attesting witnesses to the effect that some or all of the requirements of the statute had not been complied with in its execution. (*Chaffee v. Baptist Miss. Con.* 10 Paige, 85; *Rutherford v. Rutherford*, 1 Den. 33; *Lewis v. Lewis*, 11 Id. 220.) To these cases may be added the case of *Woolley v. Woolley* (95 N. Y. 231), recently decided in this court. Such cases are quite frequent in the reports, and some of them arising under the former practice by which the facts were reviewed, are even cases where the appellate courts have differed in their view of the weight of evidence with the trial court and have arrived at contrary conclusions; but these decisions do not conflict with the principles laid down in the cases above cited. They differ only in the facts to which the rules of law are applicable.

The determination of the question of fact involved in the inquiry as to whether a will has been properly executed or not is governed by the same rules which control in the trial of other questions of fact. The proponent has the affirmative of the issue, and if he fails to convince the trial court by satisfactory evidence that each and every condition required to make a

good execution of a will has been complied with, he will necessarily fail in establishing such will.

It would undoubtedly have been competent for the trial court in this case to have denied probate to the will in question upon the evidence before it, and in that event we should have been bound by its decision. This, however, it has not done, but on the contrary has found that the will was duly executed.

Upon referring to the evidence in the case, we certainly find quite an unusual and extraordinary condition. The two persons purporting to have signed this will as subscribing witnesses, not only each testify that none of the formalities required by the statute were complied with in its execution in their presence, but also positively deny that either of them was present at its execution or signed the attestation clause. No greater weight can be given to that part of the evidence of these witnesses wherein they deny that the several formalities required by the statute were unperformed in the execution of this will, than to their more important testimony that they were not present on the occasion and did not sign the attestation clause. It follows, of course, that if they do not recollect, or perversely refuse to testify to the interview itself, that they would also deny the several incidents which accompanied such an interview.

If, therefore, it was established by competent evidence that these witnesses were mistaken as to the fact of acting as witnesses to the execution of this will, it would almost necessarily follow that they were also mistaken in their testimony as to the several particulars occurring at the time of such signing. "If so important a fact as the signature of their names as witnesses has escaped recollection, the accompanying incidents must have shared the same fate." "The denial of the principal event necessarily involves all the details in the same result." (*Peebles v. Case*, 2 Bradf. 236.) Upon looking into the evidence we find that it was in proof that the testator boarded and lodged with the alleged subscribing witnesses (who were husband and wife) not only at the time the will purported to have been executed, but had done so for several years previous

thereto. That the husband had been a subscribing witness to a will previously executed by the testator, and that the will in dispute, apparently properly executed, was found among the papers of the deceased after his death. It also appeared that the will, as well as the attestation clause, was wholly in the handwriting of the testator, and also bore his undoubted signature at the end thereof. The testator declared during his last sickness that the will, executed as he had described it, was either among his papers or that he had given it to his executor. A bag containing the testator's papers, and among which was the will in question, was produced by the executor at a meeting of the testator's relatives, including the contestants, held at such executor's house on the day of the testator's death, and its contents were then for the first time made known to the parties interested by one of such relatives, who read it in the presence of the persons there assembled. Specimens of the handwriting of each of the subscribing witnesses were properly put in evidence on the trial, and from a comparison of such specimens with the signatures of the witnesses to the attestation clause, experts testified that such signatures were respectively in the genuine handwriting of such witnesses. But little is disclosed by the case with reference to the occupation, condition or character of the testator; but it does appear that he was a bachelor about fifty years of age and possessed of property of the value of about \$12,000; that he had been for some time afflicted with a disease from which his death within a short period might reasonably have been anticipated. The will in question was the second made by him within a period of about five years, and the subject of a testamentary disposition of his property had obviously for some years been within his earnest contemplation.

The prior will, duly canceled, was put in evidence on the trial, and although its contents do not appear in the record, it was proved to have been executed in accordance with the forms prescribed by the statute.

The surrogate has found as a fact upon conflicting yet competent evidence, that the subscribing witnesses to the will in question in fact signed the attestation clause.

We thus have an holographic will, not only properly signed and executed by the testator, but also signed by the witnesses, and appearing upon its face to be entirely regular, and purporting to have been executed with all of the formalities and in the manner required by the law to make a good and valid will.

The witnesses to the will have, by signing the attestation clause, certified to facts taking place upon its execution, directly conflicting with the evidence given by them upon the trial. To believe this evidence requires us to suppose that the testator deliberately forged the names of witnesses to his will at a time and under circumstances when it was just as convenient for him to have obtained their genuine signatures thereto. Upon this evidence the surrogate has refused to give credit to their testimony, and must, we think, necessarily have found, for reasons appearing sufficient to him, that none of the evidence given by them was entitled to belief. While no motive or reason appears upon the face of the evidence incorporated in the record before us, for imputing corruption or perjury to the subscribing witnesses in giving such evidence, yet to believe what they testify to on the subject involves consequences so unnatural and improbable that we are constrained to hold that the surrogate was justified in discrediting their testimony.

The affirmative evidence tending to show an omission on the part of the testator and witnesses to comply with the requirements of the law, in the execution of the will, having been thus discredited by the court below, it only remains to determine whether there was, within the rule, sufficient evidence of the facts to authorize the surrogate to find the due execution of the will.

It would seem from the language of the Code, that proof of the handwriting of the testator, and of the subscribing witnesses, to a proper attestation clause, was regarded as the most important and conclusive fact on the trial of an issue as to a proper execution of a will. Such evidence, in connection with other circumstances tending to prove its due execution, would seem, within all the authorities, to justify a decree

admitting it to probate, even against the positive evidence of the subscribing witnesses. It was always considered to afford a strong presumption of compliance with the requirements of the statute, in relation to the execution of wills, that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by the law, but also with the importance of a strict adherence thereto. (*Chambers v. Queen's Proctor*, 2 Curteis, 415; *In re Kellum*, 52 N. Y. 519; *Gove v. Gaven*, 3 Curteis, 151; *Peck v. Cary*, 27 N. Y. 9.)

We think that that presumption also arises in this case. The testator had not only once correctly gone through the ceremony of executing a will, but by drawing the attestation clause in question he had at the time necessarily brought before his mind each one of the conditions imposed by the statute as necessary to its valid execution. It is quite unreasonable to suppose that such a person having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required, to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony at the expense of time and labor to himself and the commission of a motiveless crime. The presumptions arising from the certificate of the subscribing witnesses, and the supervision of an experienced person that the requisite formalities were complied with, are fortified by the acts and conduct of the testator. Nearly three years elapsed between the date of the will and the death of the testator, and he had, therefore, ample time and opportunity to supply any defects in its execution, if any existed, but at the last moment, when the subject of a will was brought to his attention, he evidently supposed that he had made a valid testamentary disposition of his property.

It also appears that it was executed while the testator was living in the family of the alleged witnesses ; that one of them had formerly acted in a similar capacity for him, and that they were both persons who, for convenience as well as from their relations to the testator, would naturally have been selected as witnesses to a will drawn by himself, and whose execution he personally supervised.

We think the various circumstances to which we have referred, in connection with the full and regular attestation clause in the handwriting of the testator, proved to have been signed by the witnesses, were sufficient to authorize the finding by the court below establishing the will.

Of course no controversy can arise in this case over any question as to the real intention of the testator in the disposition made by this will of his property, for not only were his wishes deliberately formed, but they are recorded in his own handwriting, which implies care and deliberation on his part in framing its provisions and directions. It is the duty of the court to carry into effect a testator's intentions when they can be discovered, provided they do not contravene any provision of law.

It follows from these views that the judgment appealed from should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

THAYER vs. SPEAR.

[Supreme Court of Vermont, January, 1886, 8 Eastern Reporter, 734.]

BEQUEST ON CONDITION OF HUSBAND'S DEATH.—PUBLIC POLICY.

A gift of the income of a fund to a married woman so long as she remains the wife of her then husband, and of the entire estate should she "be left a widow, or for any cause should cease to be" his wife, is not contrary to public policy.

PROCEEDING to distribute an estate.

E. J. Mc Wain, for plaintiffs.

N. L. Boyden, for defendant.

ROYCE, Ch. J. Rosan M. Leathers bequeathed to her daughter, Alice E. Thayer, all of the income of her estate, and such further sums out of said estate as her needs and wants might demand, so long as she remained the wife of Ira Allen Thayer, and left the amount of the sums to be paid to the said Alice to the judgment and discretion of her executor. In case her said daughter "should be left a widow, or for any cause should cease to be the wife of the said Ira Allen Thayer," then all of the estate should be given to said daughter and subject to her control.

The case comes here upon exceptions taken to the judgment of the County Court affirming a decree of distribution made by the Probate Court. That decree followed the disposition made by the will, and directed the executor to pay to the said Alice all the income of the remainder of said estate, and such other sum as in his judgment and discretion he deems best, so long as the said Alice remains the wife of Ira Allen Thayer; and that in case the said Alice should be left a widow, or for any cause should cease to be the wife of the said Ira, he, the said executor, was directed to pay over all that might remain of said estate to said Alice. The appeal was taken by the said Ira and his wife, and it is claimed by the appellants that the condition named by the testatrix in making the bequest is void as be-

ing against public policy, and that the entire estate should have been decreed to the said Alice.

The ground upon which it is claimed that the provision of the will violates public policy is; that it furnishes an inducement to the wife to become the widow of her husband, or to separate herself from him in such a manner that she would cease to be his wife. The appellants, to sustain this claim, rely upon the rule as stated in 2 Redf. Wills, 293; 1 Story's Eq. Jur. 291, and the case of *Conrad v. Long* (33 Mich. 78). The cases cited in support of the rule laid down in Redfield and Story, it will be found on examination, do not sustain the rule as here sought to be applied. They are generally cases in which an inducement was directly held out to encourage a voluntary separation of husband and wife, and where the intent to encourage such a separation could be found in the language employed in making the bequest. They are none of them so similar in their facts to the case at bar that they can be considered authorities in it.

The first object is to ascertain, if possible, what the intention of the testatrix was; and we find no difficulty in reaching the conclusion, that it was to have her estate disposed of just as it has been by the Probate Court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income, only, was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate.

The judgment is affirmed and ordered to be certified to the Probate Court.

Conditions in a will void as against public policy.—It is a general rule of law that any condition in a will which furnishes an inducement to a wife to become the widow of her husband, or which encourages voluntary separation of husband and wife, or the living of the wife apart from her husband, or the husband apart from his wife—in a word any condition the tendency of which is to break up or unsettle the marriage relation—is void as being contrary to public policy.

In an early case, where a father bequeathed a sum of money to his daughter "if she would be divorced from her husband," the condition was held void, and that, although precedent in its character, the gift nevertheless took effect. *Tennant v. Braie, Tothill*, 141.

And where the testator directed that "if his niece lived with her husband, his executors should pay her £3 per month and no more, but if she lived from him, and with her mother, then they should allow her £5 per month," it was held that the legatee was entitled to the larger sum without living apart from her husband, and that, though the condition was "*contra bonos mores*, the legacy was pure and simple." *Brown v. Peck*, 1 Eden. 140.

Again, in the case of *Wren v. Bradley*, 2 DeG. and Sm. 49, where an annuity was bequeathed to a daughter, a married woman, "in case she should be living apart from her husband and should continue to do so" during the life of the testator's widow, and providing that the annuity should cease whenever the annuitant should cohabit with her husband, and where the will also contained a residuary trust, the income of which was to be paid to the daughter during such time as she should continue to live apart from her husband, but directed that whenever she should cohabit with her husband, such income should be paid to other legatees—the will also containing a trust for children of the daughter by any other husband; the daughter and her husband living apart at the date of the will, but being reconciled and living together at the death of the testator, and subsequently, it was held that the daughter was entitled to the full benefit of all the provisions of the will in her favor. In giving judgment the court said: "It is impossible to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation and prevent the wife from living with her husband, and that by that wish, by that object, its provisions as to her were influenced and directed. The weight of authority * * * and the principles of the civil law, as far as I consider them applicable, seem to me to render a decision of this case, in *Mrs. Wren's* favor, consistent at once with technical equity and moral justice." See also 2 *White & Tudor's Lead. Cas. in Equity*, 204, 205.

There is a curious application of a somewhat similar principle in the case of *Rombach v. Piedmont and Arlington Life Insurance Co.* 35 La. Ann. 233, wherein it was held that a son-in-law has no insurable interest in the life of his mother-in-law, as though for the reason that a policy of insurance upon her life in his favor would give him an interest rather in her death than in her continued life.

It is well settled that conditions annexed to gifts of both real and personal property to a widow, that they shall become inoperative in the event of the remarriage of the devisee, are valid and will be enforced. *Collier v. Slaughter*, 20 Ala. 263; *Hogan v. Curtin*, 88 N. Y. 162; *Barton v. Barton*, 2 Vern. 308; *Frey v. Thompson*, 66 Ala. 287; *Giles v.*

Little, 2 McCrary, 370; Dumey v. Schoeffler, 24 Mo. 170; Chapin v. Marvin, 12 Wend. 538; Guider v. Newsom, 24 Ga. 139; Lingart v. Ripley, 19 Ohio St. 24; Cornell v. Lovett, 35 Penn. St. 100; Newton v. Marsden, 2 J. & H. 356; Scott v. Tyler, 9 Brown's Chan. 487; Comm. v. Stauffer, 10 Barr. 350; 1 Story's Eq. Jur. § 285, and cases there collected.

This is equally the rule whether the gift to the widow is by her husband, or by another person. Lloyd v. Lloyd, 2 Sim. (N. S.) 255. So also where the gift is to a husband on condition that he remains a widower. Bostick v. Bloder, 59 Md. 231; s. c. 3 Am. Prob. R. 364, and note.

These cases proceed upon the assumption that one left a widow and deprived of the maintenance which a husband might provide may properly be left an estate for her reasonable support, which shall terminate wholly or in part whenever by remarriage she may again become entitled to support by another husband. So in the leading case it appears that one may, by will, properly provide more largely for a daughter if at any time she be left dependent, than so long as she may have some other means of support. This is plainly sound doctrine, and after the analogy of the cases last cited as to conditions against the remarriage of a widow.

MONTAGUE vs. ALLAN'S EX'RS.

[78 Virginia, 592.]

CIRCUMSTANTIAL EVIDENCE OF TESTATOR'S KNOWLEDGE OF WILL.

Testator's knowledge of the contents of the will at the time of execution may be shown by circumstantial evidence.

A will is not invalidated by the fact that it was written by a confidential friend of the testator, whose wife is a legatee thereunder.

ACTION to annul a will.

Joseph Christian and *John Lyon*, for appellants.

Jones, Kean & Nelson, for appellees.

FAUNTLEROY, J. On the 2d of April, 1881, Mrs. Louisa G. Allan, of Richmond, executed and acknowledged her last will and testament—a paper drawn by Mr. George W. Mayo, who was named as one of the executors, and whose wife was a large

beneficiary. The testatrix died on the 24th of the same month. The will was admitted to probate by the Chancery Court for the city of Richmond, April 27th, 1881, when Geo. W. Mayo qualified as executor.

On September the 5th, 1882, Miss Genevieve Allan (who since the institution of the suit has intermarried with D. P. Montague) exhibited her bill in the said Chancery Court, in which, after reciting the probate of the paper aforesaid, and stating that she is one of the three heirs at law and distributees of Louisa G. Allan, deceased, she alleged that Mrs. Allan, when she signed and acknowledged the will or testamentary writing aforesaid, was insane; that she was not of sound mind; that she was mentally incompetent to make a lawful will, and that the paper in question was procured by George W. Mayo, who was the confidential agent and adviser of the testatrix, by the selfish exercise of undue influence over her mind, enfeebled by injuries, disease and age.

Mayo, his wife and some other defendants, answered the bill; the cause was matured; and the chancellor directed the trial of an issue, *devisavit vel non*, at the bar of the court. At the close of the evidence, of which a great deal, both oral and written, was introduced before the jury, the plaintiffs in the issue (the appellees here) requested the court to give certain instructions, which the court did give, without objection or exception from the defendants in the issue (the appellants). Upon the trial of the issue, the jury failed to agree upon a verdict; but upon a second trial, at a subsequent term of the said court, the jury found a verdict sustaining the said paper of April 2d, 1881, in all its parts and provisions, as the true last will and testament of Louisa G. Allan, deceased. Upon the recordation of this verdict, the defendants in the issue moved the court to set aside the verdict of the jury and to grant a new trial on the said issue; and the court took time to consider thereof. On the 24th February, 1883, the court overruled the said motion to set aside the said verdict of the jury and to grant a new trial on the issue directed in the cause; and pronounced its decree, in conformity with the said verdict of the jury, that the will of the testatrix, Louisa G. Allan, admitted

to probate in the said court on the 27th day of April, 1881, is the true last will and testament of Louisa G. Allan, deceased; and the court dismissed the bill of the complainants with costs. From this decree the appeal is taken, and this court is now to decide whether there is error in the proceedings of the court below, as disclosed by the transcript of the record in the cause.

That the will was properly executed, according to the statute, there is no room for contention, and there is none; it was signed, sealed and acknowledged by the testatrix, in the presence of two witnesses, who, at her request, in her presence, and in the presence of each other, affixed their signatures as attesting witnesses. The statute was complied with in every particular.

The *instructions* given by the court are not complained of. They were not excepted to by either plaintiffs or defendants in the court below; in fact, they were accepted, and acquiesced in by both sides; and they correctly expound the law of the case. No exceptions having been taken to the instructions, neither party will be allowed to question here the correctness of the law laid down by the court as applicable to the evidence in this cause. (*Lamberts v. Cooper's Ex'or*, 29 Gratt. 66.)

The validity of Mrs. Allan's will is disputed on two grounds—first, that she was insane and mentally incapable of making a lawful will at the time that she executed it; and, secondly, that it was made under the improper or undue influence of George W. Mayo, who wrote it; who is named as executor; who was the confidential agent and adviser of the testatrix, and whose wife is the principal beneficiary. All the facts proved in the cause are certified in the record, and the proofs show that the contestants' own witnesses all testified to the intelligence and capacity of the testatrix when her attention was fixed; they contain no hint of insanity, but, on the contrary, they show a testatrix of uncommon intelligence, business capacity, self-reliance and will, who, recently before her death, undertook and intelligently conducted intricate and tedious business transactions, and who to the day of her dissolution—certainly to within two or three days of her death—retained her clear intellect and controlled and directed her domestic affairs. The

certificate of facts says: "All of these witnesses (for the contestants) described her failure of memory only as the forgetfulness of old age, and none of them doubted her intelligence and capacity when her attention was fixed." As to the failure of memory, the authorities are explicit that, if it be merely such as is incident to old age, it does not affect testamentary capacity. (*Eddy's Case*, 32 N. J. Eq. 701; *Zoe v. McCord*, 74 Ill. 33.)

We think that the testimony of the contestants' own witnesses fully proves that the testatrix was both sane and capable of making the will. But the propounders of the will proved that Mr. Ellyson, an educated lawyer, who was called in to attest the execution of the will, with the view of testing her testamentary capacity, conversed with her on the occasion when she executed the will, and was perfectly satisfied as to the condition of her mind; that he "was perfectly certain of her capacity to make a will, and was so struck with her mental vigor, for one of her age, that he remarked on it when he got home." Mr. Hopkins, the other subscribing witness, "is certain that Mrs. Allan was in her right mind, and was competent to make a will." On or about the 20th or 25th of March, 1881, Dr. McGuire was again sent for to cut a cancer from Mrs. Allan's other breast (he having performed that operation in 1875 upon one of her breasts); he consulted with Dr. Harris, her regular family physician, and talked freely with her, when her "mind clearly grasped and her courage bravely faced the alternative before her—death certain in the not remote future in one event; death tedious, lingering, loathsome, in the other event; death under the knife, possibly, speedy but painless; that she made deliberate, intelligent and voluntary choice." On April 1, 1881, he called to see her, and found her in the hall, with the pictures, which had hung on the walls, lying about, when she apologized for the confusion, saying she was making some dispositions of the pictures in case she should die; and, nearly to the last—"certainly to within two or three days of her death—she retained her clear intellect." Dr. McGuire had no doubt of her testamentary capacity down to three days before her death, when process of dissolution had commenced. Drs. Harris and

McGuire, with whom Dr. Cunningham agreed, so far as he knew her, considered her a woman of remarkably strong mind and will, which remained unimpaired up to the time of her dissolution; and, in their opinion, she could not have been controlled into making a will which she did not want to make. These three physicians, all gentlemen of high personal and professional character, had been medical attendants upon Mrs. Allan, and two of them during her last illness. "Physicians are considered as occupying a high grade on such questions, * * * especially a physician who has attended the patient through the disease which is supposed to have disabled her mind." (*Cheatam v. Hatcher*, 30 Gratt. 65.)

Miss Jennie Galt testified that she corresponded regularly with Mrs. Allan for many years, up to a few weeks before March 4th, 1881, and that she saw in Mrs. Allan's letters, written with her own hand, no signs of a failing mind or memory. Mr. Hoffman Allan, a grandson of Mrs. Allan, and one of her three heirs at law, testified that he had once asked her to give him the house she lived in, and twice for the parlor curtains; that she refused to give him the house, saying "she intended to give that to those who needed it more;" that he declined to claim against the will propounded; and that he believed the same to be the true last will of his grandmother.

Miss Louisa G. Allan, the sister of Hoffman Allan, a grandchild of the testatrix, and one of her three heirs at law (who was introduced by the contestants), testified that she lived with Mrs. Allan as a member of her family, and that her grandmother was capable of making a will to the last of her life. This witness, now in her twentieth year, would, together with her brother, Hoffman Allan, if the will were annulled, take, by descent, two-thirds of the entire estate.

It is impossible to resist the conclusion, to which we are compelled by these facts in the record, that the testatrix was wholly and unquestionably competent to make her will when she executed the paper in controversy April 2d, 1881.

But the appellants contend that the decedent, "at the time of executing the said paper," did not know the contents of the said paper, and did not understand the disposition thereby made

of her property ; that she was subjected to the undue influence of George W. Mayo, who drew the will, who was present and procured its execution against her free will and purpose ; that the jury, in finding for the will, disregarded the instructions of the court, and found a verdict plainly contrary to the law, as expounded, and the facts, as certified by the court.

The court, which gave the instructions to the jury, approved the verdict found, and refused to set it aside, as being neither contrary to the law nor the evidence which had gone to the jury. Judge Christian, speaking for this court in *Blosser v. Harshbarger* (21 Gratt. 216), citing *Krugh v. Shanks* (5 Leigh, 598), says : " In the Appellate Court there is superadded to the weight, which must always be given to the verdict of a jury, fairly rendered, that of the opinion of the judge who presided at the trial, which is always entitled to peculiar respect, upon the question of a new trial. The whole case was one peculiarly proper to be submitted to a jury, who are the proper judges of the weight of the evidence, and the verdict having been fairly rendered, and approved by the judge before whom the case was tried, it would be a violation of well settled principles of law so often adjudicated by the courts, as well as an unwarranted abuse of the appellate powers of the court, to set aside the verdict and judgment, because the judges of this court might not concur with the verdict of the jury, upon the facts as they are certified here." Judge Scott, in *Grayson's Case* (6 Gratt. 712), said, where " some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances, or presumptions, a new trial will not be granted, merely because the court, if, upon the jury, would have given a different verdict."

In *Patteson v. Ford* (2 Gratt. 24), Judge Baldwin said, " much respect is due to the opinion of the jury, whose province is to weigh conflicting evidence, to scan the credit of witnesses, to estimate the force of circumstances, probabilities and presumptions, and to canvass intentions and motives. This is so evident that the courts habitually defer to the conclusions of juries upon matters of fact, though opposed to their own ; and hence the rule not to disturb a verdict, unless in case of

plain deviation from the evidence." It is contended by the appellants, that beside the fact that the will was written by George W. Mayo, he produced it on the occasion of its execution, and Mrs. Allan signed and acknowledged it, without reading or having it read to her.

It is true that the will was not read by or to Mrs. Allan *when* she signed it; but it does not, therefore, follow that she had not read it and was not fully aware of its contents and provisions. The jury must be satisfied that the testatrix knew the contents of the will at the time of signing and executing it, and they were, in this case, so explicitly instructed by the court; but the authorities are full and conclusive that they may be *so satisfied*, and that such knowledge may be proved by *circumstantial* evidence, and that *direct evidence* is not indispensably necessary. In the case of *Barry v. Butlin* (1 Curtis, 6 Eng. Ecc. R. 417), Park, B., said: "Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over, the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased."

In *Crispell v. Dubois* (4 Barb. 393), Harris, J., after stating that it would have been more satisfactory to have had evidence that the testatrix gave instructions for drawing the will, or that it was read by or to her, says: "But although such evidence would unquestionably have been the most satisfactory, I am not prepared to say that it was indispensable. I have been able to find no case in which this particular description of proof has been required. On the contrary, I understand the doctrine to be well settled, that while it is necessary in such cases to prove that the will is the 'spontaneous intention' of the testator, such proof may be made out in any mode in which his real intentions can be ascertained." In *Raworth v. Marriott* (2d Eng. Ch. R. 644), Sir John Leach, M. R., held that the jury who tried the validity of the will must be satisfied that the testator knew its contents, but their consideration need not be confined

to *direct* evidence, and they may find for the will on circumstantial evidence only.

In *Donney v. Murphey* (1 Dev. & Batt. pp. 91-2), Ruffin, C. J., says, "there are other circumstances equally satisfactory—such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be prompted, by natural affection, to make."

The appellants insist that Mayo's confidential relations to the testatrix, coupled with the facts that he wrote the will, and that his wife is the principal beneficiary, raise a conclusive presumption against the validity of the paper. Such circumstances certainly engender suspicion and arouse the vigilance of the court and jury, and, if unexplained or repelled, they would annul the transaction. There is a well recognized distinction between the rule affecting *testamentary* gifts, and gifts *inter vivos*; and it is now well settled by an unbroken current of authority, both English and American, that a *will* is not invalidated by the mere fact that it was written by the attorney, agent, physician, priest, or other confidential adviser of the testator, who is himself a beneficiary. (*Daniel v. Hill*, 52 Ala. 430; *Crispell v. Dubois*, *supra*; *Barry v. Butlin*, *supra*.)

In the light of these authorities, the facts appearing in this record afford satisfactory evidence that Mrs. Allan, the testatrix, knew the contents of the will when she executed it.

They show a testatrix of sound mind and strong will; they disclose testamentary dispositions in accord with her affections and with her repeated declarations; they prove that she marked her pictures preparatory, as she said, to disposing of them, and that her will refers to and disposes of them by means of marks; that she acknowledged the paper to be her will after its execution, and that it remained in her possession from the time of its execution to the day and event of her death. It is but just to George W. Mayo to add that, although the will was written by him, and his wife is the chief beneficiary under it, yet that wife was the child of the beloved and favorite sister of Mrs. Allan, lived in her home with her, and was unto her as a daughter; and that, in fact, she takes no greater benefit under the will established than she did under the olograph will of 1876.

We are of opinion that the paper executed by Mrs. Allan for her will, April 2d, 1881, and duly probated as such April 27th, 1881, in the Chancery Court of Richmond city, is the true and last will of the testatrix aforesaid; that the verdict of the jury was right; that there is no error in the decree appealed from, and that the same must be affirmed.

Decree affirmed.

MORIN *vs.* RAILROAD.

[33 Minnesota, 176.]

FOREIGN JUDGMENT AS EVIDENCE OF DEATH OR HEIRSHIP.

A judgment of a Probate Court of another State, ascertaining the heirs of a decedent under its laws, is not admissible against one not a party thereto, in an ejectment action in this State, as proof of death or heirship.

ACTION for ejectment.

R. B. Galusha and *J. Kling*, for appellant.

Wilson & Lawrence, for respondent.

DICKINSON, J. This is an action of ejectment, in which the title to the land is in issue. One William L. Larnerd was the original owner of an undivided one-half of the land. The plaintiff sought to prove the devolution of this estate upon himself. For this purpose he offered in evidence an exemplification of the records of the Probate Court for the county of Ing-ham, in the State of Michigan, showing these facts: One Horatio H. Larnerd filed his petition in the said Probate Court, alleging the death, in the State of Michigan, of William L. Larnerd, and that he died seized of certain described lands in that State; that the petitioner was his son, and, with the

widow, one Elizabeth J. Larnerd, constituted the only heirs at law of the deceased. The prayer of the petition was that the court adjudge who were the heirs of the deceased and entitled to inherit such real estate. Upon the hearing of this petition, after publication of notice, the court, after reciting the facts established upon the hearing, as set forth in the petition, adjudged the said Horatio H. Larnerd and Elizabeth J. Larnerd to be the heirs at law of the said William L. Larnerd, and entitled by the laws of the State of Michigan to inherit the real estate of the said deceased. The defendant excepted to the ruling of the court admitting this evidence, and now assigns the same as error. The plaintiff showed, by a chain of conveyances, the transmission of the title of Horatio H. and Elizabeth J. Larnerd to himself.

The facts sought to be proved by the record evidence referred to—that is, the death of William J. Larnerd, and the heirship, under the laws of this State, of Horatio H. Larnerd and Elizabeth J. Larnerd—were substantive and essential facts upon which the plaintiff's title, which was in issue, depended. More strict proof is required under such circumstances than is requisite when such questions arise incidentally or collaterally. (2 Phil. Ev. 93; 2 Greenl. Ev. § 278a.) Upon authority we consider that the evidence was inadmissible. (*Thompson v. Donaldson*, 3 Esp. 63; 2 Phil. Ev. 93; *Mutual Ben. Life Ins. Co. v. Tisdale*, 91 U. S. 238; *Carroll v. Carroll*, 60 N. Y. 121; *English v. Murray*, 13 Tex. 366; and see *Day v. Floyd*, 130 Mass. 488, 489.)

There is no recognized principle of the law of evidence to which the admissibility of this evidence can be referred, unless it is to be considered that the determination of the Probate Court was an *adjudication* of the facts of death and heirship, and an adjudication of such a nature as to affect and conclude strangers, not parties to that proceeding, in a contest relating solely to lands in the State of Minnesota. But such an effect cannot be given to that judgment when presented as proof in this action of the facts of death and of heirship under the laws of this State. The facts in issue in this action, and to which the evidence was directed, being entirely different from those

as to which the Probate Court adjudicated, and this defendant, against whom the judgment was offered, having been in no sense a party to the proceedings before that court, the judgment was not of effect as an adjudication of the facts necessary to be proved here, and was not even *prima facie* evidence of such facts.

The proceeding in the Probate Court and the judgment therein were in their nature *in rem*, and may be regarded as concluding all the world as to the matters directly adjudicated. And it would seem, too, that in any subsequent proceeding involving the same *thing* or *subject* as that before adjudicated upon, and in which conclusive effect is to be given to such former judgment, such effect may be attributed, not only to that which was actually declared and expressly determined by the judgment, but also in respect to the grounds or facts upon which the judgment proceeds. (*Pick v. Strong*, 26 Minn. 303.) But the irrelevancy of that judgment to the issue here is apparent when it is considered how foreign to the subject here involved were the facts adjudicated by the Michigan court. The only subject before that court for adjudication, or in respect to which it assumed to adjudicate, was the heirship, according to the laws of Michigan, in respect to certain real property in that State. With respect to lands in Minnesota, and as to who were entitled to inherit them, the court neither assumed to adjudicate, nor had it power to do so. The facts to be established in this action relate only to real property situate here, the inheritance of which, upon the death of the owner, must be determined by our statutes of descent, whatever may be the laws of inheritance in the State of Michigan. If, in fact, the statutes of the two States controlling the descent of real property are the same (which does not appear), that does not affect the case. In that case, it is true, the Minnesota lands would be inherited by the same persons who were entitled to succeed to the lands in Michigan; but this would be simply from the operation of our law of descent, entirely unaffected by the foreign adjudication. That has nothing to do with this case.

It seems, then, to be apparent that the judgment itself, rendered by the Probate Court in Michigan, was irrelevant to the

matter in issue here, and, of course, was of no effect as proof, unless it is to be considered that, because that judgment must have necessarily involved the determination by the court of the fact of the death of William L. Larned, the judgment is therefore evidence of that fact in this case. But it cannot be that, in a case where the former judgment itself is irrelevant to any fact in issue, those not actually parties to the proceeding can be affected in respect to the grounds or facts upon which that judgment may have been based. As has been already suggested, so far as the fact of death may bear upon the validity or effect of the adjudication *in rem*, it may be inferred from the judgment itself that the person from whom the inheritance is declared to have descended is dead, for the judgment necessarily depends upon that fact. But such an inference is not to be made in proceedings in no way related to the *res* which was the subject of the former adjudication, nor as to persons who, as to the former proceedings, are to be deemed strangers, and not parties. As to them, the former proceedings are *res inter alios actæ*. (See, in addition to authorities cited above, *Kearney v. Denn*, 15 Wall. 51; *Bogardus v. Clarke*, 1 Edw. Ch. 266; s. c. affirmed, 4 Paige, 623; *Executors of Crosland v. Murdock*, 4 McCord, 217.)

These views are not in conflict with that class of cases in which it has been held that a grant of letters testamentary or of administration is proof, in actions by or against the executor or administrator in his representative capacity, of the regularity of the proceedings resulting in their issuance, and of the legal authority of the representative. Of this character is *Pick v. Strong* (*supra*). These decisions are in harmony with the familiar principles of the law relating to judgments *in rem*. In Broom's Leg. Max. 957, the law is thus expressed: "A judgment *in rem* renders the thing adjudicated upon, *ipso facto*, such as it is thereby declared to be, and is, therefore, of effect as between all persons whatever. Thus, a grant of probate or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him," and so it is "conclusive as against all the world." But that such a grant of probate or of

administration is not even *prima facie* evidence of the death of the person upon whose estate it is made, in a proceeding not connected with the administration, is shown by the authorities above cited. It is held otherwise in Iowa and New Hampshire (*Tisdale v. Connecticut Mut. Life Ins. Co.* 26 Iowa, 170; *Jeffers v. Radcliff*, 10 N. H. 242), although, in the case last cited, the court admits that the law in England is not so.

Order reversed and a new trial awarded.

ROBINS vs. MCCLURE.

[New York Court of Appeals, November, 1885; 3 Eastern Reporter, 115.]

HUSBAND'S RIGHT TO PERSONALTY OF WIFE DYING PARTIALLY INTESTATE.

The statutes authorizing married women to hold, convey and devise property as if unmarried, do not deprive the husband of his common law right to her personality where she dies wholly intestate or only partly intestate through the lapsing of legacies.

Nor is his right affected by his accepting a legacy and qualifying as executor under his wife's will.

ACTION to determine rights of parties to estate.

Edward C. James, for appellant.

J. W. Peckett, for respondent.

MILLER, J. The question to be determined in this case is whether John S. McClure, the defendant, and executor under the last will and testament of his wife, Caroline McClure, is entitled to that portion of the estate of the testatrix which by her will was devised to her brother, Wright Robins, and which lapsed by reason of his death prior to the death of the testatrix.

The testatrix, by her will, devised to her husband certain real estate and personal property, and also one-half of the residue of her estate, both real and personal, absolutely. The remainder, which consisted of personal estate, she gave and bequeathed to her brother, Wright Robins, and her sister, Mrs. Elizabeth Carter, to be equally divided between them. She left no descendants or ancestors. Her husband qualified as executor, and claims to be entitled to that portion of the estate which is lapsed, under the common law, by virtue of his marital rights.

The plaintiff claims as one of the next of kin and heirs at law, being a son of a deceased brother of the testatrix, Isaac Robins, an interest in such unbequeathed personal property, and brings this action on behalf of himself and for the benefit of such next of kin and heirs at law as will come in and contribute to the expenses thereof.

By the common law the husband became entitled to that portion of his wife's personal property of which she was actually possessed at the time of her marriage, or which came to her during coverture. In case of the wife's death prior to that of her husband, he was authorized to take out letters of administration upon her estate, and, as administrator, after the payment of her debts, if any there were, he retained and became the owner of the assets remaining in his hands as such administrator under the practice then existing, by means of which, before the statute of distributions, the administrator converted and appropriated the assets in his hands to his own use. A contest arose between the ecclesiastical and temporal courts concerning the right of the administrator to thus appropriate the funds, which contest was finally settled by the passage of the statute of distributions (22 Car. II, chap. 10), and as doubt still existed in regard to the rights of the husband, an explanatory act (23 Car. II, chap. 3) was passed, by section 25 of which it was declared that this statute should not be construed to extend to the estates of *femes covert* dying intestate, but that the husband should have the same right to administer and enjoy such estate as before the passage of the said act.

The rule of the common law, which authorized the husband to hold the property of his wife, by virtue of administration, has been extended in this State so as to entitle him to hold the same also by virtue of his marital rights, and numerous cases sustain this doctrine. In the case of *Ransom v. Nichols* (22 N. Y. 110) it was held that, where a married woman, possessed of separate personal estate, dies without having made any disposition of it in her lifetime, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to any other person. In the case cited, letters of administration had been taken out by a third person upon the wife's estate, and an action was brought against the maker of a note to recover the amount of the same, which note was originally given to the deceased wife, and afterwards renewed payable to the husband and held by him. It appeared upon the trial that the amount of the note had been settled with the husband and taken up and canceled. It is said in the opinion: "The property, then, in this case stands precisely upon the footing of choses in action of the wife, which have not been reduced to possession during the coverture. In this event the husband has the right to recover and enjoy them as his own, either as an incident to the marital relation and as flowing from it, or as an incident to his right of administration upon her estate; and for all practical purposes, it is immaterial to which source this right should be referred. This right of administration is secured primarily to the husband by the statute, and indeed, according to some authorities, it exists in the husband *jure mariti*, and wholly irrespective of any statutory provisions upon the subject." It will be noticed that the husband did not administer upon the estate of his wife, and hence it was claimed that he had no authority to interfere with her assets or to settle with the defendant who was the maker of the note. The decision expressly overrules this position and upholds his claim by virtue of his marital rights.

In *Ryder v. Hulse* (24 N. Y. 372) the action was brought for the recovery of certain notes bequeathed by the wife of the plaintiff, who had taken out letters of administration upon her

estate, to a third person, which notes had been acquired before the passage of the married woman's acts of 1848 and 1849, and it was held that the wife had no power to dispose of said notes by will, and that the plaintiff was entitled to recover, and it was laid down in the opinion by Wright, J., that all the personal estate of a wife vests absolutely in the husband at the moment of marriage, and all she acquires during coverture immediately becomes his, and that the same rule applies to choses in action, and as to those she has only a contingent interest; that in the event of the wife's death the husband does not take the choses in action not then reduced to possession by virtue of any statute of distribution or as next of kin, but the property is already vested in him, and if he should die before recovering, then they would be assets of his estate to be recovered by his representatives, and not by the representatives of his wife; that by his wife's death her interest becomes extinct and his becomes absolute with the right of possession as administrator. It is further said that the same view of the question was taken in the case of *Ransom v. Nichols* (22 N. Y. 110), which is commented upon, and the rights of the husband by virtue of the marital relation fully sustained.

In *Olmstead v. Keyes* (85 N. Y. 602) the rule laid down in the cases cited is fully upheld. It is said, in the opinion by Earl, J., that "all the choses of the wife, not reduced to possession during the joint lives, by the common law, passed to the husband upon her death. * * * He may then release them or take payment of them without administration if he can get payment. If administration is needed to reduce the choses to possession, he is entitled to it; and if there are no debts, the administration is solely for his benefit. If, after his wife's death, the husband does not release, assign or reduce to possession her choses in action during his lifetime, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets." (See, also, *Westervelt v. Gregg*, 12 N. Y. 210; s. c. 62 Am. Dec. 160; 2 Kent's Com. 136, 143; Reeve's Dom. Rel. 1st ed. 1.)

In *Barnes v. Underwood* (47 N. Y. 351) it was held in the opinion, that, "at common law marriage is an absolute gift to the husband of the goods and chattels and personal property of which the wife is actually possessed and of such as come to her during coverture. As to choses in action, marriage is only a qualified gift, conditioned that the husband reduce them to possession during the existence of the marriage relation, and, when so recovered, the title vests absolutely in him." It is said that the husband became entitled to the estate of his deceased wife by virtue of the right to administer; that this right did not depend upon a title existing during marriage, but upon that which he acquired upon her death by the exclusive right to administer her estate as her successor.

In that case no notice is taken of the decisions of this court already cited, which had previously been made, and in which it was laid down, as we have seen, that the husband, at common law, became vested with all the personal property of his wife by virtue of the marital relation, and not solely as administrator, and as these cases are not considered or discussed in the opinion, and no dissent expressed in reference to the same, the rule therein stated cannot be regarded as overruled or in any way affected or impaired. Until this is done by an authoritative decision of this court they must stand as the settled law of the State, applicable to cases involving the same or any similar question.

We are not referred to any case in the English reports where the rule of the common law is stated exactly and in the precise form as in *Barnes v. Underwood* (*supra*).

In *Fleet v. Perrins*, which was first reported in L. R. 3 Q. B. 536, and afterward, on appeal, in L. R. 4 Q. B. 500, it was held that, where the defendant received money from a third person, to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal, and the wife died, and then her husband; and the wife's administratrix sued the defendant for money had and received to the use of the wife, the action was rightly brought by the wife's representative, as the facts showed only a chose in action conferred

on the wife, with which the husband had not interfered during coverture.

In the case cited the distinct objection was taken that the action could not be maintained by the plaintiff as administratrix of the wife, on the ground that it was for money received by the defendant for the wife during coverture, and that, as her husband survived her, the administratrix of the husband was alone entitled to sue for the recovery of it. The decision in this case sustains the doctrine, no doubt, that where the husband has not interfered with the choses in action of the wife during her life, the same pass to her next of kin or heirs at law, and his representatives, upon his death, after the death of the wife, have no right thereto as a part of his estate to which he was entitled by virtue of the marital relation.

While it is nowhere laid down in the case last cited, that the husband who survives the wife is entitled to her personal estate as administrator, and not by virtue of the marital relation, the conclusion arrived at is nevertheless in conflict with the current decisions of the courts of this State, as we have seen, and it should not be followed.

The rule of the common law, as explained by these decisions, was fully recognized by the provisions of the Revised Statutes.

The husband was solely entitled to letters of administration upon his wife's estate, and if he failed to take out letters he was presumed to have assets in his hands sufficient to pay her debts, and was held liable therefor; and if he died leaving any assets of his wife unadministered, they passed to his executors or administrators as part of his personal estate, but subject to her debts. (2 R. S. 75, § 29.) If any one else administered, the husband was entitled to the assets which remained after the payment of debts. (2 R. S. 75, § 30.) And it was further provided that the statute of distribution should not apply to the personal estate of married women, but it was declared that their husbands might demand, recover and enjoy the same as they are entitled by the rules of the common law. (2 R. S. 98, § 79.) The enactments referred to, remained in

force until a new system was inaugurated having in view the protection of the rights of married women, under which material changes were made in the laws in respect to the same as they had previously existed. These laws embrace enactments by the legislature at different times, and contained provisions in reference to the separate estates of married women which did not exist at common law or under the statutes of Great Britain, or the statutes of this State, as will be seen by a reference to the same.

The first enactment (chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849) declared that the wife's property should not be subject to the disposal of her husband or liable for his debts, but should continue her sole and separate property as if she were a single female, and she was empowered to take and hold property and convey and devise the same as if she were unmarried. By chapter 576, Laws of 1853, the husband were exempted from the payment of his wife's debts contracted before her marriage. By chapter 90, Laws of 1860, and by chapter 172, Laws of 1862, other provisions were made in conformity with the previous enactments, the effect of which was to separate the estate of a married woman from the control of her husband and confer upon her the same rights as if she were unmarried, and relieve the husband from the liability previously existing for the payment of her debts. Then followed chapter 782, Laws of 1867, which contained other provisions of a similar character, and among other things an amendment to section 79 of the Revised Statutes (*supra*), by the repeal of its former provisions, and making it read as follows: "§ 79. The preceding provisions, respecting the distributions of estates, shall apply to the personal estates of married women dying, leaving descendants then surviving; and the husband of any such deceased married woman shall be entitled to the same distributive share in the personal estate of his wife to which a widow is entitled in the personal estate of her husband, by the provisions of this chapter, and no more." By section 11 of the same act, section 30 of the Revised Statutes (*supra*) was repealed.

In view of the changes thus made, the question arises, what

effect is to be given to the enactments last named? It is claimed by the appellant's counsel that the amendment of section 79 and the repeal of section 30 did not leave the common law in *proprio vigore* as the general term assumes; that they were affirmative of the common law; that where a statute affirmative of the common law is abolished, the common law must likewise be abolished, otherwise the repealing act would be a nullity. These provisions made the following changes: First. That under section 79, instead of the husband being entitled to the whole of the wife's personal estate, he was only entitled by the amendment, when the married woman died leaving descendants, to the same distributive share as a widow would have in the estate of her deceased husband. Second. By the repeal of section 30, where letters of administration were granted to any other person than the husband, the administrator would be bound, in case the person dying left descendants, as provided in section 79, to pay over to the husband only one-third of the personal estate, and divide the balance among the descendants. It will be seen that no provision was made for the distribution of the estate where a married woman died without leaving any descendants, and leaving a husband her surviving.

The provisions of the statutes to which we have referred were the subject of consideration in *Barnes v. Underwood* (*supra*), and it was there held that the amendment of the seventy-ninth section of the statute of distribution, in 1867, did not affect the right of the husband to administration and enjoyment of his deceased wife's personal estate, except in the case therein specified of her dying leaving descendants. Church, Ch. J., after discussing the effect of section 79, as amended, and the repeal of section 30, says: "It is equally clear that, if that section had been originally enacted in the form as amended in 1867, the right of the husband would not have been affected by it, except in the single case, therein specified, of the wife's dying leaving descendants, and in that case, the husband would have been limited to the distribution therein specified; and such is its only effect and operation now. The twenty-ninth section, giving the husband the abso-

lute right of administration and enjoyment, remains in full force, except as qualified by the amendment of the seventy-ninth section in 1867; but the qualification has no application, unless the wife dies leaving descendants. * * * It is unnecessary to determine the effect of the repeal of the thirtieth section, until a case is presented where the husband does not himself administer upon the estate."

As the testatrix in the case at bar left no descendants, her husband became entitled to the same interest in her personal property as though the amendment of section 79, and the repeal of section 30, had not been made, either as administrator, if he was authorized to administer upon her effects, or if not, as we have seen, by virtue of his marital rights under the decisions of the courts in this State. That he was unable to administer by reason of his being executor under his wife's will could make no difference, as the law established his rights independent of his right to administer. In either case the property belonged to him, and he could not be deprived of his rights because his wife left a will in which provision was made for him, and he was appointed executor, and acts as such, and accepts a devise and bequest in his favor under the will.

If the husband had not accepted the appointment of executor under the will, and refused to qualify, and if an administrator had been appointed with the will annexed, could it be said that he waived his right as husband at common law, and that the estate thereby passed to the next of kin or heirs at law of the deceased? The amendment of section 79 only affected his interests where the wife died leaving descendants, and under that provision alone it cannot be claimed that the husband would be deprived of his rights at common law, and, although the repeal of section 30 left no provision for the payment of assets to the husband by the administrator, as the married woman's acts of 1848 and 1849, as we have seen, and as the authorities hold (*Ransom v. Nichols*, 22 N. Y. 110; *Ryder v. Hulse*, 24 Id. 372; *Barnes v. Underwood*, 47 Id. 351; *Valance v. Bausch*, 8 Abb. Pr. 368; *Fry v. Smith*, 10 Abb. N. C. 224; *Gilman v. McArdle*, 12 Id. 414), made no change in

the common law as to the husband's rights, it is a fair and legitimate inference that the common law remained in force and was applicable in such a case. The repeal of section 30 was essential to give force to the amendment of section 79, as it was inconsistent with the latter provision, and it does not appear that it affected any other statute. Under section 29, the husband was still entitled to letters of administration, and the common law alone remained in force. If otherwise competent, he was entitled solely to take out letters of administration, and if he did not take them out, he was presumed to have assets in his hands sufficient to pay her debts, and was liable therefor.

While entitled to her estate at common law, there would seem to be no valid ground for holding that he should be deprived of the same if unfortunately, by reason of incompetency, he was unable to administer. In the case considered, the husband would have been competent to act as administrator but for the will of his deceased wife, and having acted as executor, he holds the portion of the estate as to which she died intestate in his hands as such. Letters of administration, therefore, are not necessary to protect his interest, and no reason would seem to exist why, as at common law he was entitled to her estate, he could not hold that portion which lapsed by reason of her intestacy in regard to the same.

It may also be remarked that no person but the husband has administered upon the estate of the testatrix, nor was any person in opposition to him entitled to letters of administration. As executor for all purposes of administration he has exercised control over the property of his deceased wife. Although in name there is a difference between executor and administrator, there is really none in fact and in law, and each has control over the personal estate and the distribution of the same. His administration as executor under the will is in most respects the same as if he was an administrator under the statute, and, as the portion undisposed of by the testatrix belongs to him, no reason exists why he should not retain it. This view is supported by *Fry v. Smith* (10 Abb. N. C. 225), which, although a special term decision, is entitled to weight. The

case of *Kearney v. Miss. Society* (10 Abb. 274), which was previously decided by the same judge, is claimed to be inconsistent with *Fry v. Smith*. In the first case cited a distinction was made between the two cases, and it was held that if the latter case cited announced doctrines in opposition to the conclusion reached in the former, to that extent it could not be followed. See, also, *Williams v. Seaman*, 3 Redf. 148. The appellant's counsel relies upon the case of *Sedgwick v. Stanton* (14 N. Y. 289) as authority for the position that where a statute affirmative of the common law is abolished, the common law must likewise be abolished. In that case the question presented was in reference to the effect of the repeal of a statute in regard to maintenance, and the court held that the repeal of the statute abolished the common law, of which it was declaratory. It will be seen that this related to a particular offense against a law establishing a crime, and under such circumstances there is the strongest reason for holding that when the statute was repealed no crime existed according to law. Section 30 of the Revised Statutes, which has been referred to, was only one of a series of provisions in regard to the distribution of property, and was evidently repealed because it came in conflict with section 79, as amended by the same act that repealed section 30, and as it is evident that it was repealed for the purpose of harmonizing different provisions of law, and other general provisions were left in force, and as to some of these provisions the common law was held to prevail by the decisions of the court, the case cited is not in point.

There is nothing, we think, in the decisions, or in the statutes, which sustain the position that the effect of the married woman's acts, which authorize her to make a will, is to extinguish the husband's right to any portion of her personal estate, except so much thereof as the will gives him, where, by the lapse of a legacy, she dies intestate as to some part thereof. In such a case, the portion which becomes lapsed is undisposed of, and it is not apparent why it would not be regarded the same as if she had made no will. As to that part, she certainly dies intestate, and no sound reason is urged why the rules relating

to intestacy should not be held to apply. No argument, we think, can fairly be derived favorable to the intention of the legislature to abolish the common law in such a case, and the tendency of the decisions in this class of cases is to uphold the rights of the husband at common law unless they are expressly taken away by legislative enactment.

The doctrine of election has no application to this case.

The judgment should be affirmed.

ANDREWS, RAPALLO and EARL, JJ., concur; DANFORTH, J., reads dissenting opinion; RUGER, Ch. J., and FINCH, J., not voting.

Judgment affirmed.

DANFORTH, J. It must be conceded that the tendency of decisions in this court is to uphold the rights of the husband as they existed at common law, and if the facts in this case were like those in which the decisions stand, I should feel constrained by them to assent to the affirmance of the judgment now before us. They are, however, not identical, and I feel at liberty to dissent, putting my vote on what seems to me the true construction of the statutes relating to married women. By their express terms the wife's estate was to continue her sole and separate property, as if she were a single female. As to it, therefore, she is to be regarded as unmarried, and I am, therefore, unable to see how any portion of it could pass to her husband *jure mariti*. The general contention in support of the judgment is that the quality of separate property is extinguished by the wife's death. I cannot so read the statute, nor do I find in it any words of limitation. By common law the woman by marriage became merged or incorporated in the man, and the same event vested in him, as by gift, her property. On the other hand, the statute not only permits her to retain it with like effect as if unmarried, but expressly declares that it shall not be subject to the disposal of her husband. By these words the intention of the legislature is made plain, and it carries out the title of the statute, which is "for the more effectual protection of the property of married women." The

body of the act shows that this protection is against the rights of the man theretofore acquired by coverture. It is made effective by changing the character of the wife's estate, and giving it the incidents which belong to the property of a single woman. It does not change the character at her death, and it follows that her husband can take no part of it under the common law by virtue of any marital rights.

The judgment is to the contrary, and should, I think, be reversed.

HYLAND *vs.* BAXTER.

[98 New York, 610.]

INCIDENTAL EQUITY JURISDICTION OF SURROGATE'S COURT.

A surrogate's court, although of limited statutory jurisdiction, under a general authority to control and settle the accounts of executors and administrators, and to determine on an accounting all questions concerning any debt, claim, legacy, or distributive share, has jurisdiction to determine, on equitable principles, the propriety of allowing an administrator's claim for past maintenance of a minor entitled to a share in the estate.

ACTION by an administrator for advances made by him for support of his intestate's minor children.

The deceased left three minor children, who resided with their mother, who was co-administrator with the plaintiff, and were supported by her out of moneys advanced by plaintiff at her request.

Plaintiff, on his accounting in the surrogate's court, set out these advances and asked to have them charged against the children's distributive shares in the estate. This claim was disallowed after a hearing before an auditor, who reported that the surrogate had no jurisdiction to determine the same. Pending an appeal from the surrogate's judgment sustaining this report, the present action was brought to have the ad-

vances applied in reduction of the amounts adjudged to the infants against plaintiff by the surrogate.

William F. Cogswell, for appellants.

Charles J. Bissell, for respondents.

ANDREWS, J. The claim of the original plaintiff to be allowed the amount advanced by him to his co-administrator, and applied by her to the support and maintenance of the infant children of Bernard Baxter, the intestate, was presented to the surrogate on the accounting of the administrators, and was disallowed by his decree in that proceeding. It was in the nature of a claim for an allowance for past maintenance, and if the power of a court of equity to make such allowance, invoked in this action, pertained to the surrogate on the accounting, his determination is *res judicata*, and is conclusive upon the parties until set aside or reversed, however erroneous it may have been. (*Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *In re Hood*, 90 Id. 512.) The principle of *res judicata* supports the conclusiveness of a judgment when the same matter is subsequently called in question between the parties in a collateral action, whether the question was rightly or wrongly decided, on the principle of quieting contentions, and securing the orderly administration of justice. If, therefore, the surrogate had jurisdiction to pass upon the merits of the claim for past maintenance, this action cannot be maintained, and the plaintiffs must seek their remedy in the prior proceeding.

The power of a court of equity to make an allowance out of the estate of infants for past maintenance was carefully examined and affirmed by the chancellor in *Matter of Bostwick* (4 Johns. Ch. 105), where the mother of certain infants entitled to the principal of a sum of money on her death, presented her petition praying for an order that a portion of the principal belonging to the infants should be applied to reimburse her for their past maintenance and to discharge of debts necessarily incurred by her for that purpose, and also to provide for their

maintenance in the future. The chancellor granted the relief in both aspects, and, referring to the ruling of Lord Thurlow, in *Andrews v. Partington* (3 Bro. 401), that no allowance could be made to a parent for the past maintenance of an infant, said: "It would lead to great inconvenience, for, though the wants of the infant might be ever so pressing, he could not receive any maintenance (charity excepted) without the expense of a suit and reference to a master." It is not necessary, at the present time, to consider the rules which govern courts of equity in exercising this jurisdiction, but the general principle has been applied in many cases, that an allowance for past maintenance may be made to executors, trustees, or guardians, upon an accounting or upon petition, even when it requires a breaking in upon the capital, provided the expenditure for which reimbursement is sought would have been authorized by the court if an application has been made in advance. (*Lee v. Brown*, 4 Ves. 362; *Greenwell v. Greenwell*, 5 Id. 194; *Sisson v. Shaw*, 9 Id. 285; *Prince v. Hine*, 26 Beav. 634; 2 Wms. on Ex'rs, 1272; 2 Lead. Cases in Eq. 720.)

There is no express power conferred upon a surrogate to make an allowance for past maintenance upon an accounting by executors or administrators. But he is authorized to direct and control the conduct, and settle the accounts of executors and administrators, and to administer justice in all matters relating to the affairs of deceased persons according to the statutes of this State. (2 R. S. 220, § 1, subds. 3, 6.) The limitation, following the enumeration of the powers granted to the surrogate in the section cited, that "they shall be exercised in the cases and in the manner prescribed by the statutes of this State," does not confine the exercise of his jurisdiction to such acts only as are expressly authorized, but his jurisdiction is subject to the general principle governing the construction of powers, that an authority conferred for a particular purpose, carries with it by implication such incidental powers as are requisite to the complete execution of the power expressly granted. (*Seaman v. Duryea*, 11 N. Y. 324; *Sipperly v. Baucus*, 24 Id. 46; *Riggs v. Cragg*, 89 Id. 479.) The general

power granted to the surrogate in the section cited, to direct and control the conduct and settle the accounts of executors and administrators, is supplemented by specific provisions in the article relating to the rendering and settlement of their accounts and the distribution of the estate. The seventy-first section (2 R. S. 95) declares that the surrogate in his final decree on an accounting, shall settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share, to whom the same shall be payable, and the sum to be paid to each person. There seems to be no good reason arising out of the nature of the question, or the constitution of the tribunal, which should deprive a surrogate upon a settlement of the account of an executor or administrator where advances have been made for maintenance, to determine, upon equitable principles, a claim for an allowance. On the contrary, it would seem to be a very proper place and time to have the question determined, thereby saving expense and preventing further litigation. It is true that an administrator in making advances acts without authority and at his peril, but this is true in every case where a parent, or one in *loco parentis*, or a trustee, or guardian, makes advances not previously sanctioned by the court or by the instrument creating the trust, and comes to the court for relief. The fact that the question is an equitable one, and depends upon equitable principles, is not a ground of objection to the jurisdiction. The surrogate's court is a court of limited powers and jurisdiction, but it has jurisdiction to determine questions, either legal or equitable, arising in the course of proceedings in the execution of powers expressly conferred, and which must be decided therein. (*Jumel v. Jumel*, 7 Paige, 591; *Boughton v. Flint*, 74 N. Y. 476; *Riggs v. Cragg*, *supra*.) In the case last cited it was held that where the right to a legacy depended upon the construction of a will, the surrogate has jurisdiction to construe the will, as incident to his power to make distribution, although he has no general jurisdiction in the construction of wills. It has been held that a surrogate cannot decree a set-off of judgments, or dispute the validity of a judgment, or settle disputed claims. (*Stilwell v. Carpenter*, 59 N. Y. 414; *McNulty v. Hurd*, 72

Id. 518; *Tucker v. Tucker*, 4 Keyes, 136.) These cases proceeded upon special grounds not necessary to be stated. But a surrogate may adjust a claim of the executor against the estate, whether legal or equitable. (*Jumel v. Jumel*, *supra*; *Boughton v. Flint*, *supra*.) In the present case the surrogate was called upon to settle the accounts of the administrators, and decree distribution of the estate in their hands, and the statute made it his duty in the proceeding to settle and determine all questions concerning any claim or distributive share. The statute in some cases expressly confers jurisdiction upon the surrogate to direct the application of an infant's property to his support. (2 R. S. 91, § 49.) It also authorizes testamentary trustees to settle their accounts before the surrogate, and declares that his decree on a final settlement shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction, as to all "matters relating to such trust," embraced in the accounts, or litigated or determined on the settlement. (Laws of 1850, chap. 272.) In an accounting, under this statute, the surrogate could, we think, pass upon and determine a claim made by the trustee for allowance for past maintenance of an infant *cestui que trust*. We are also of opinion that the same power existed in the present case, as incident to the power of the surrogate to settle the accounts of administrators and decree distribution among the next of kin. This conclusion leads to an affirmance of the judgment. The objection to the allowance to Hyland of sums necessarily expended for the support of the infants, seems very inequitable. The General Term, on the appeal from the surrogate's decree, may be able to find some way of doing justice between the parties.

The judgment should be affirmed, but without costs to either party on this appeal.

All concur.

Judgment affirmed.

HINCKLEY vs. THATCHER.

[139 Massachusetts, 477.]

EVIDENCE TO DETERMINE BENEFICIARY OF CHARITABLE USE.

A residuary gift "equally to the authorized agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ," creates a valid charitable use, and in determining who are to take thereunder evidence may be received of the names testator called the missionary societies, or by which they were usually known, the interest shown by him in any particular society, and the contributions made by him to missionary purposes.

ACTION for the construction of the following residuary clause of the will of Henry Knox Thatcher :

"I also will and desire that the residue of my property, if any, after paying my funeral expenses and just debts, as well as all before-named bequests, be given equally to the Authorized Agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ."

M. A. Fowler, J. L. Thorndike and F. C. Welch, for the next of kin.

R. R. Bishop and G. Wigglesworth, for American Board of Commissioners of Foreign Missions and the Attorney-General.

J. N. Marshall, for Massachusetts Home Missionary Society.

FIELD, J. Henry Knox Thatcher died on April 5, 1880, leaving a will, which was executed on March 18, 1870, and was written by himself. The first clause of the last article of the will is as follows: "I also will and desire that the residue of my property, if any, after paying my funeral expenses and just debts, as well as all before-named bequests, be given equally to the Authorized Agents of the Home and Foreign Mis-

sionary Societies to aid in propagating the Holy religion of Jesus Christ."

In the original will the word "Home," and the words "Foreign Missionary Societies," begin with a capital letter. There is nothing else in the will that affords any aid in construing this clause, unless it be thought that the declaration in the first clause of the will might aid the court in determining what the testator meant by "the Holy religion of Jesus Christ," if it becomes necessary to determine it. That declaration is as follows: "Realizing the uncertainty of human life, which by the blessing of my Heavenly Father I have been permitted to enjoy for so long a time, and acknowledging my firm belief in Him, and in the efficacy of the atonement of His Son, our Lord and Saviour Jesus Christ, and with the hope of the final salvation of my immortal soul through His merits, and being of sound mind and memory, I declare this instrument to be my last Will and Testament."

The two principle questions argued are, first, whether the Home and Foreign Missionary Societies intended by the testator can be identified; and secondly, if they cannot be, whether this is a valid charitable bequest. One question of evidence has been argued, which is, whether evidence of the testator's religious opinions at the time he executed the will is admissible, either for the purpose of identifying the societies, or of showing what the testator meant by "the Holy religion of Jesus Christ."

The case is one in which no society or societies are shown to exist which conform accurately to the name or description contained in the will; and such cases as *Tucker v. Seaman's Aid Society* (7 Met. 188) need not be noticed.

In *Shore v. Wilson* (9 Cl. & Fin. 355) it was left undetermined whether the religious opinions of Lady Hewley could be shown for the purpose of determining the meaning of the words "Godly preachers of Christ's holy Gospel," contained in her deed of 1704. "The evidence which goes to show the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party," was held ad-

missible, and sufficient to support the decision. (P. 550.) A majority of the judges, however, whose opinions were taken by the House of Lords, advised that evidence of the religious views of Lady Hewley could not be considered except for the purpose of showing her connection with a religious denomination the members of which used the words in a restricted sense, and the House of Lords intimate that such is their opinion. (See *Drummond v. Attorney-General*, 2 H. L. Cas. 837, and *Charter v. Charter*, L. R. 7 H. L. 364.) But in carrying into effect, by means of a scheme, a charitable bequest for religious purposes, when the terms of the gift are indefinite, it seems that the religious opinions of the donor are sometimes regarded in England. (*Attorney-General v. Calvert*, 23 Beav. 248; *Attorney-General v. Glasgow College*, 2 Coll. Ch. 665.) The precise point we find it necessary now to discuss is whether such evidence can be considered for the purpose of identifying the missionary societies intended by the will.

It may perhaps be conceded that the private religious opinions of the testator would not be competent evidence, but evidence of his public religious acts and association with a particular denomination of Christians, in connection with other testimony, has often been admitted; and we are not prepared to say that there might not be cases in which such evidence, unconnected with other evidence, would be competent. If each denomination of Christians had one missionary society bearing the name of the denomination, and a testator left a bequest to "the Missionary Society," without further description, his publicly professed religious belief would naturally throw some light upon the meaning. It could not well be presumed that a zealous Roman Catholic could intend by these indefinite words a Protestant missionary society, or that a zealous Trinitarian intended such a gift for a Unitarian society.

There is, however, little or no evidence in this case of the religious opinions of the testator, except as they may be inferred from his acts in connection with churches and religious societies, and the usages of those churches and societies; and it is unnecessary to decide whether his religious

opinions, disconnected from the other evidence, would be competent. Some of the evidence reported relates to times which were so long after the execution of the will as to be incompetent.

In carrying into execution every will, extrinsic evidence is necessary to identify the legatees. The evidence often leaves no room for doubt, as the name or description of the legatee in the will accurately conforms to the facts established by the evidence; but when the evidence raises a doubt, the question arises whether, by competent evidence, the identity of the legatee can be ascertained with reasonable certainty.

The facts known to the testator at the time he executed this will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions, if any, that he made for missionary purposes, are competent evidence to aid in identifying the missionary societies intended by the will.

The testator was a Rear Admiral in the Navy of the United States, and was retired from active service in 1868, when he went to reside in Winchester, in this Commonwealth, where he had previously bought a house, and with it a pew in the meeting-house in Winchester, in which a Trinitarian Congregational church and society worshipped. In the testimony, the word Congregational is confined to Orthodox or Trinitarian Congregational churches and societies, and, for convenience, we shall use the word in that sense. The testator was not a member of any church until 1878, when he was confirmed in the Protestant Episcopal Church at Charlestown, in this Commonwealth. His principal place of residence from 1868 until his death seems to have been Winchester, although he was absent something less than a year at Portsmouth, New Hampshire, as Port Admiral, and from 1873 his summers, or some of them, were spent in Nahant, and the winters for the last two years of his life were spent in Boston. In the spring of 1871, he became a member of the Congregational Society at Win-

chester by vote of the society. When in Winchester, he appears to have attended constantly the morning service of the Congregational Church, and often the afternoon service, when there was such a service, and frequently the evening meetings and monthly concerts, and the business meetings of the society after he became a member, and he was a member of the Bible Class of the Sunday School. He paid annually his pew-tax of seventy-two dollars a year, and a subscription of fifty dollars, for the support of the church and society. When in Nahant, he attended the Methodist Episcopal Church, the only other church in Nahant being a Union Church, in which ministers of different denominations preached in turn during the summer. After he was confirmed in the Episcopal Church in Charlestown, in 1878, he occasionally attended that church, but otherwise continued, as before, to attend the Congregational Church in Winchester. It appears that Admiral Thatcher, as a boy, was accustomed to attend a Congregational church; that his father, mother and sisters were of that faith; that he was married in 1831, and his wife was a member of that church; and that, when on shore and at home, he for the next ten years attended with her a Congregational church in Mercer, Maine. It seems that the religious service in the Navy, which he attended when on duty, was the Episcopal service. In 1854 and 1855, in Philadelphia, he went to different churches. In 1859, he was stationed at the Charlestown Navy Yard in Massachusetts, and remained there until January, 1862. He attended the Episcopal service at the yard, or on shipboard in the morning, and in the afternoon went with his wife, sometimes to the Episcopal Church, and sometimes to the Congregational Church. At one time, about 1849, he hired a pew in Grace Church, an Episcopal church in Boston, and he and his wife agreed that they should go half the day to the Episcopal Church, and half the day to the Congregational Church; but this pew he gave up not long afterwards, and went to a Congregational church.

In Portland, in 1842, he went to the Congregational Church. He was in active service during the war, and in 1866 was ordered to the Pacific coast, to take command of the North

Pacific Squadron, with his headquarters at San Francisco, where he remained about two years, and, when on shore in San Francisco, he attended Dr. Stone's church, which was Congregational, and Dr. Eell's church, which was Presbyterian. At Honolulu, in 1866, he did not attend the Episcopal Church, but attended either a Congregational or Presbyterian church. At all churches where he attended, he was in the habit of putting something in the contribution-box whenever it was passed, whatever the object of the contribution was, and he habitually contributed in this way to both home and foreign missions in Winchester. There is no evidence that he ever worshipped with a Roman Catholic, a Baptist, or a Unitarian church.

It is apparent that Admiral Thatcher was a constant attendant upon public religious worship; that he confined his attendance to the Protestant Trinitarian churches; that he used in the Navy, as is customary, the Episcopal service; that at times before 1870 he showed a personal preference for the Episcopal church, but that this preference was not very strong; that he attended the Episcopal, Congregational, Methodist, or Presbyterian churches, without any decided denominational bias, according to his convenience or his approbation of the minister or the service; and that, as a fact, he more frequently attended the Congregational churches than any other, influenced perhaps, to some extent, by the wishes of his wife.

The interest he is shown to have felt in the missionary work of the American Board, the knowledge of the relations existing between that Board and the Massachusetts Home Missionary Society, which he obtained from Mr. Phillips, the manner in which the two societies were usually spoken of in the church and religious society at Winchester, where he worshipped when he made the will, and the manner in which he spoke of them, have far more significance than the evidence of his attendance at churches.

Of the list of missionary societies contained in the schedule annexed to the answer of the Attorney-General, there is no evidence that the existence of the greater part of them was

known to the testator when he executed his will, although he probably knew that nearly all the different Christian denominations had missionaries and missionary societies. It appears abundantly by the testimony that in 1870, when the will was executed, he knew of the American Board of Commissioners for Foreign Missions; had been acquainted with some of its officers, agents, and missionaries; and was interested in the work that society was doing; and that he knew of the Massachusetts Home Missionary Society as a co-operating society, devoted wholly to home missions, while the American Board was devoted exclusively to foreign missions. It does not appear that he knew definitely the relations existing between the Massachusetts Home Missionary Society and the American Home Missionary Society. He had, when in command of the *Constellation* in the Mediterranean, some years before he went to reside at Winchester, proceeded with his ship to Syria to witness the execution of a murderer of one of the missionaries of the American Board; and although he did not witness it, yet the circumstance seems to have called his attention to the foreign missionaries of the American Board and the work they were doing, and from that time he manifested in many ways unusual interest in the missions of that Board; and in 1869 the American Board began sending him the *Missionary Herald*, a monthly publication of that society. From 1869, therefore, he was constantly receiving the *Missionary Herald*. The American Board of Commissioners for Foreign Missions is the principal foreign missionary society of the Congregational Church in the United States. It was one of the principal charities to which the Congregational Church and Society at Winchester contributed before and in 1870; and by the Foreign Missionary Society, in the Congregational Church and Society at Winchester, before and in the year 1870, this society was meant. Both before and after executing this will, he is shown to have spoken approvingly of the work of the missionaries of that society in the East. He was interested in the purchase of a vessel called the *Morning Star*, which was built by the American Board in 1870. If the bequest in the will had been solely to the Foreign Missionary Society, in view of the

knowledge of the testator, at the time of the execution of the will, of the American Board of Commissioners for Foreign Missions, the interest he had shown in it, the acquaintance he had had with some of its officers and missionaries, the favorable opinion he entertained of the work it was doing, the fact that in the church and religious society which he attended it was often spoken of as the Foreign Missionary Society, and was the foreign missionary society for which contributions were annually taken up, to which he contributed, and was one of the great charities which that church and religious society was supporting, and the only one called by that name—and also of the fact that it is not shown that he at that time was interested in any other American foreign missionary society—we can have no doubt that it would be a reasonable and proper inference that the testator intended, by the Foreign Missionary Society, the American Board of Commissioners for Foreign Missions. (*American Tract Society v. De Witt*, 9 Allen, 447; *Tilton v. American Bible Society*, 60 N. H. 377; *Attorney-General v. Dublin*, 38 N. H. 459; *Goodhue v. Clark*, 37 N. H. 525; *Button v. American Tract Society*, 23 Vt. 336, 349; *Dunnam v. Averill*, 45 Conn. 61; *Howard v. American Peace Society*, 49 Maine, 288; *Brewster v. McCall*, 15 Conn. 274; *In re Fearn's Will*, 27 W. R. 392; *In re Kilvert's Trusts*, L. R. 7 Ch. 170.)

But the bequest is “equally to the Authorized Agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ.” The word “Societies” plainly shows that more than one society was meant, and that the words “the Home and Foreign Missionary Societies” were not intended as the name of one society. One contention is, that two, and only two, societies were meant—one the Home Missionary Society, and the other the Foreign Missionary Society. The use of the definite article and of the capital letters by the testator perhaps slightly favors this contention. The facts favor it. If there had been more than one society known to the testator in which he was interested, each of which was a home and foreign missionary society, the contention might well be that he intended this bequest for each of such

societies ; but no such facts appear. There is a little evidence of an American missionary society or association " which does work among the slaves at the South, as well as foreign missionary work," to which the Church and Society at Winchester contributed from 1870 to 1880 ; but it is not shown that Admiral Thatcher ever spoke of it, or took any interest in it, or ever knew of its existence, unless this is to be inferred from the fact that he attended the meetings when contributions for this society or association were sometimes taken. Whether this society or association is incorporated or not, there is no evidence which enables us to determine, and the evidence regarding this society is too slight and indefinite to affect the determination of this case.

In 1866, Admiral Thatcher spoke to Mr. Phillips " of the good work which the Wesleyan Missionary Society in the Southern Pacific had done," and he was evidently familiar with the fact that the Methodist Episcopal Church had foreign missions, and probably with the fact that that church had home missions. It does not, however, appear that he knew that any of the Protestant Trinitarian churches of the United States carried on their missionary work by means of societies, each of which was both a home and foreign missionary society ; and he did understand that the principal missionary work of the Congregational Church was divided between the American Board, which was wholly a foreign missionary society, and the Massachusetts Home Missionary Society, which, with the American Home Missionary Society, to which it was auxiliary, was exclusively a home missionary society.

The following testimony of Mr. Phillips as to the conversation had with Admiral Thatcher, in 1866, is significant of the understanding he had of the connection of the Massachusetts Home Missionary Society with the American Board : " I told him that I understood the purpose of the American Board was limited to foreign work, but that there was another body in Massachusetts which was known as the Home Missionary Society, which was, after all, the domestic branch co-operating with the foreign branch, and the two acting together to uphold the general cause of missions ; * * * that I understood

that there were two branches, the home and foreign branches, and we talked always, we spoke frequently of the home and foreign branches of the organization ; but at the same time he did not understand and did not state—I did not state and he did not state, and it was not stated to him—that they were exactly branches of the same society, [but] that they were two societies each of which had the good will of the other, and the two co-operated together. * * * Then I told him that the Home Missionary Society was organized at a somewhat later day, as I understood, to take charge of the domestic work of those who were interested in the missionary movement ; but that it was necessarily an independent organization, because the foreign charter did not allow them to take hold of it.”

We think it is a fair inference from the language of the will, and the facts shown to have been known to the testator when he made it, that he intended to divide the residue of his property equally between home missions and foreign missions ; and that he understood that there was a home missionary society, or were home missionary societies, and a foreign missionary society or foreign missionary societies, to whose agents he intended this residue to be paid. As this residue then was to be divided into two equal parts, one to be devoted to home missions and one to foreign missions, and as no intention is expressed that these parts should be subdivided, the natural construction of the testator's words is, that he had in mind two definite societies, one a home missionary society, and the other a foreign missionary society, to whose agents the residue should be paid in equal shares ; and the clause is to be construed as if it read, “I also will and desire that the residue of my property be given equally to the Authorized Agents of the Home Missionary Society and the Foreign Missionary Society to aid in propagating the Holy religion of Jesus Christ.” If read in this way, we think the evidence makes it reasonably certain what societies were intended. By the Foreign Missionary Society, we think, as we have said, the evidence makes it clear that the testator intended the American Board of Commissioners for Foreign Missions.

Although the evidence does not show that the testator took a special interest in the Massachusetts Home Missionary Society, yet it was the society which, more than any other, represented to him, at the time he made his will, the cause of home missions, the only home missionary society of which he is shown to have had any definite knowledge; and it was a Massachusetts society which, in the Church and Religious Society at Winchester, sustained the same relation to home missions as the American Board sustained to foreign missions, and was the society intended in the Church and Religious Society at Winchester when contributions for home missions were solicited; and its name answers better to the description in the will than that of any other society, except, perhaps, the American Home Missionary Society, to which it is auxiliary. We think that it is reasonably certain that the Massachusetts Home Missionary Society was intended by the words of the testator in the will.

There is no doubt that a bequest to the two societies, "to aid in the propagation of the Holy religion of Jesus Christ," is a good charitable bequest.

The decree entered must be reversed, and there must be a decree that the American Board of Commissioners for Foreign Missions, and the Massachusetts Home Missionary Society, are entitled to receive the residue in equal shares.

So ordered.

Evidence admissible to determine the beneficiary of a charitable use.—When it is shown that a beneficiary or beneficiaries exist which conform accurately to the name or description contained in the will, it is well settled that extrinsic evidence is not admissible to show that the testator meant some one else to be the recipient of his bounty. The intention of the testator is indeed the guiding star to the interpretation of the will, but by this rule is meant only the intention as it may be gathered from the words of the instrument.

Accordingly, in the case of *Tucker v. Seaman's Aid Society*, 48 Mass. 188, where a testator gave a legacy to "the Seaman's Aid Society in the city of Boston," and another society, denominated "the Seaman's Friend Society," claimed the legacy, offering to prove that the testator had no knowledge of the existence of the society named in his

will; that he knew of the existence of the other society, was deeply interested in its objects, had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy as made to that society; that the scrivener, not knowing the existence of that society, told the testator that the name of the society he referred to and wished to remember in his will was "the Seaman's Aid Society," and that the testator, thereupon, submitted to have that name inserted, it was held that this evidence was inadmissible, and that "the Seaman's Aid Society," being fully and plainly and unmistakably designated as the beneficiary, was entitled to the legacy.

Chief Justice Shaw, in the opinion in this case, says: "It is not easy to reconcile all the cases on the subject of the admission of extrinsic evidence to control or explain, or in any way give effect to, the terms of a will, and to extract from them a general rule, with all its exceptions and qualifications. In general, no extrinsic evidence of the intention of the testator is admissible to control or alter the written provisions of a will. It would be contrary to the general rule of the common law, viz., that where a party has expressed his contract or his testament in writing, duly executed, such writing is in its nature better evidence of his intention than any extrinsic evidence would be. But another and more conclusive reason is that the law requires a will to be executed in presence of three witnesses, and with other solemnities calculated to insure correctness and guard against mistake and imposition, and without this precaution every act and instrument purporting to give property, real or personal, by will, is inoperative and void. Since the Revised Statutes, the old law requiring three witnesses to a devise of real estate is extended to bequests of personal property. If, therefore, it could be proved by a dozen witnesses, beyond all doubt, that a man intended to make a will and give his property in a particular way, and to give nothing more, and gave instructions to have a will to that effect written, but before it could be written he was suddenly killed, it could not take effect. So, if he, in fact, executed a will in which a legacy was omitted that was intended to be given, expressed in the written instructions, and proved by the testimony of the scrivener and the production of the minutes. * * * In the one case it would be to establish by parol evidence a testamentary bequest which the law declares to be void, unless in writing and witnessed; in the other, it would give greater weight to an unexecuted memorandum or to *visâ voce* testimony than to an instrument formally executed, and would equally violate the statute requiring the execution of a will to be attested before it can take effect as such. * * * The present case is not a case of latent ambiguity, for the reasons already stated. On the face of the will all is plain and clear. When the will comes to be applied there are found to be two societies—one rightly named and described, the other not. There is,

then, no ambiguity as to the society intended by the will. It is the offer of proof of intent *aliunde* which creates the doubt, and this is clearly inadmissible, under the rule applicable to such a case. For the same reason there is no ground to contend that this bequest is void for uncertainty. There is no uncertainty in the terms of the will, or of its application to the society named and described. It is the extrinsic evidence, which is offered in order to create a doubt of the testator's intent, and to prove that his intent was not expressed by his will. This creates no uncertainty which can render the bequest void. The court are, therefore, all of the opinion that the treasurer of the Seaman's Aid Society is entitled to a decree." *Tucker v. Seaman's Aid Society*, 48 Mass. 188, 204, 210.

When there are two or more persons of the same name which is used by a testator to describe a legatee, extrinsic evidence is to be resorted to for the purpose of ascertaining which he had in mind.

In the case of *Bodman v. American Tract Society*, 91 Mass. 447, where the testators had, by mutual wills, made bequests to "the American Tract Society," and it appeared that there were two organizations of that name, one in Boston and one in New York, the court said: "The ambiguity with which we have to deal arises on evidence of extrinsic facts. It is the existence of two bodies bearing the same corporate name as that inserted in the wills, which renders the meaning of the bequests doubtful. The ambiguity is, therefore, latent, and on well established principles it can be helped and explained by evidence *dehors* the instruments. Such evidence does not vary the written language. It only enables the court to reject one of the two objects to which the description applies, and to ascertain which of them the testator understood to be signified by the words used in the will. It is necessarily assumed in all cases where such latent ambiguity arises in the interpretation of a will, by the existence of two persons or objects which answer the description given by the testator, that he was ignorant of the fact, or did not remember that the two were known and called by the same name. This assumption rests on the ground that it is reasonable to suppose that if the testator had known of the existence of two objects bearing the same name, he would have made the description more definite, so as to remove the ambiguity. The law permits oral evidence to be introduced in such cases for the purpose of showing which subject was known to the testator, or which he had in mind when he inserted the name in his will." "*Ambiguitas verborum latens verificatione suppletur.*" *Wigram on Extrinsic Evidence*, Prop. VII, §§ 150, 181; *Story's Eq. Juris.* (13th ed.) §§ 1169-1181.

So it was held in *Tilton v. American Bible Society*, 60 N. H. 377, where a legacy was given to "the Bible Society," and it appeared that there were several bible societies in existence when the will was made, that the particular society intended by the testator might be identified by extraneous evidence. And evidence that an annual contribution was

made for one of them in the church of which the testator was a member was held competent upon that point. In the opinion it is said: "A person known to a person as A. B., and to all others as C. D., may take a legacy given to A. B. Samuel may take a legacy given to Edward, the testator having been in the habit of calling him Edward. Citing *Parsons v. Parsons*, 1 Ves. Jr. 266; *Careless v. Careless*, 19 Ves. 601. * * * In this case if, of several bible societies, only one had been known to the testator, his knowledge and want of knowledge on that subject would have been as conclusive evidence of his intention as the existence of no more than one. And as a bequest to A. B. may be presumed to have been intended for a person of that name with whom the testator lived on intimate terms rather than for a person of the same name who was but little known to him, so it may be inferred that the testator meant the bible society for which contributions were regularly solicited in, and with the license and approval of, the religious associations of which he was a member, rather than any other bible society not thus commended to him, as a preferred object of the charity of his church, not specially brought to his consideration, and not shown to have been within his knowledge."

To the same effect see *Howard v. American Peace Society*, 49 Me. 288, and *Attorney-General v. Dublin*—"the Dublin Case"—38 N. H. 455, wherein all the learning upon this subject is very luminously set out, the opinion and briefs of counsel extending through one hundred and twenty pages of the volume.

SCHOLLE vs. SCHOLLE.

[New York Court of Appeals, January, 1886; 3 Eastern Reporter, 762.]

EFFECT OF PERMISSION TO TRUSTEE TO PURCHASE TRUST PROPERTY.

The rule avoiding a purchase by a trustee of trust property does not apply where he has an interest therein, and on special application to the court and a hearing of all parties, obtains permission to bid.

PROCEEDINGS to compel taking of title in partition action.

Alex. B. Johnson, for appellant.

Ferdinand R. Minrax, for respondents.

EARL, J. Prior to March 15, 1880, Abraham Scholle, together with the plaintiff, William Scholle, and the defendant, Jacob Scholle, were seized of certain real estate in the city of New York, as equal tenants in common. Abraham Scholle died in March, 1880, leaving a will whereby he appointed his brothers, Jacob and William Scholle, his widow, Babetta, Julius Ephrman, and Simon Davidson, executors and trustees, all of whom but William Scholle qualified as such. Davidson was subsequently discharged by order of the Surrogate's Court and the other three acted as sole trustees and executors of the will. The will was also admitted to probate in California, and there William Scholle qualified as executor. By the provisions of the will the testator gave his executors power to sell his real estate, and he directed them to sell the same and invest the proceeds as directed and pay the income thereof to his children, during their lives, and at their deaths the share of each parent was to go to his or her children *per stirpes*. The testator left two sons and two daughters, the daughters having infant children living, all of whom were made defendants in this action, and the infants were represented therein by a guardian *ad litem* duly appointed. The action was brought by William Scholle for the partition of all the real estate held in common by him, Jacob, and the testator. The action was referred to a referee, who reported that a large portion of the property was incapable of partition and would have to be sold, and a judgment in accordance with this report was entered. Thereupon plaintiff and the defendant, Jacob Scholle, presented to the court their petition setting forth their individual interests in the property and various other facts, and asking for leave to buy at the sale.

The petition came on for a hearing before the court on notice to all parties, including the guardian *ad litem* for the infants and all the other beneficiaries under the will, and the matter was referred to a referee to take testimony and report to the court together with his opinion whether Jacob and William Scholle could with safety be permitted to purchase. The referee after hearing the testimony, and full notice to all parties, reported that Jacob and William Scholle should be permitted

to purchase, provided their bids were made subject to confirmation by the court, both as to their adequacy and fairness, and his report was subsequently confirmed by the court on notice to all parties. The property was subsequently exposed for sale by the referee appointed for that purpose, and Jacob and William Scholle were the highest bidders for property amounting in value to about \$200,000. In pursuance of the directions contained in the interlocutory judgment, the same referee summoned all the parties before him, and took evidence as to the adequacy of the bids and prices paid, and after hearing all the parties, found that they were adequate, and so reported to the court, and his report was confirmed. Subsequently William and Jacob Scholle made a petition to the court to be relieved from their purchase on the ground that they could not obtain a good title because they were trustees named in the will, and at the same time the referee, appointed under the interlocutory judgment to sell the property, made a motion to compel them to complete their purchase. Both motions came on before the court at the same time on due notice to all parties interested in the property, including all the beneficiaries, and the court made an order directing William and Jacob Scholle to complete their purchase, and denied their application to be relieved therefrom, and they appealed from that order to the General Term, and from affirmance there to this court.

The general rule is not disputed that the purchase by a trustee, directly or indirectly, of any part of a trust estate which he is empowered to sell as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, have been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others.

(*Fulton v. Whitney*, 66 N. Y. 548; *Torrey v. Bank of New Orleans*, 9 Paige, 649; *Conger v. Ring*, 11 Barb. 353.) But where the trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which upon the hearing of all the parties interested is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (See *DeCaters v. DeChaumont*, 3 Paige, 178; *Gallatian v. Cunningham*, 8 Cowen, 361; *Davone v. Fanning*, 2 Johns. Ch. 252; *Bergen v. Bennett*, 1 Cai. Cas. 20; *Chapin v. Weed*, 1 Clark's Ch. 469; *Colgate, ex'r v. Colgate*, 23 N. J. Eq. 372; *Froneberger v. Lewis*, 79 N. C. 426; *Faucett v. Faucett*, 1 Bush, 511; *Michoud v. Girod*, 4 How. [U. S.] 503; *Campbell v. Walker*, 5 Vesey, Jr. 678; *Farmer v. Dean*, 32 Beav. 327; Potter's Willard's Eq. Jur. 607; Lewin's Trusts, 7th ed. 443; Godefroy's Trusts, 184.) Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that those appellants would get a good and perfect title to the lands purchased by them. And their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being. (Code of Civ. Pro. §§ 1557-1577.)

The order appealed from should, therefore, be affirmed with costs.

All concur, except MILLER, J., absent.

Order affirmed.

HIBBITS *vs.* JACK.

[97 Indiana, 570.]

CONDITIONS IN RESTRAINT OF MARRIAGE.—STATUTE.

A devise by testator to his wife "so long as she shall remain my widow," is not a "condition in restraint of marriage" within a statute avoiding such conditions.

ACTION to quiet title.

J. S. Buckles and *J. W. Ryan*, for appellant.

O. T. Boaz, *W. W. Herod* and *F. Winter*, for appellees.

NIBLACK, J. In his lifetime, and at the time of his death, as hereinafter stated, John Jack was, in addition to a considerable amount of other property, both real and personal, the owner of one undivided third part of a tract of land in Delaware county, estimated to contain sixty-five acres, upon which a flouring mill and its appurtenances were situate.

On the 27th day of September, 1859, the said Jack executed and published his last will and testament, which contained, amongst others, the following provision:

"I hereby give, devise and bequeath to my beloved wife, *so long as she shall remain my widow*, all of my goods, chattels, rights, credits, moneys and effects, of every kind and character whatever, and all of my right, claim and interest of, in and to any and all real estate, wherever situated, of which I am or may be at any time seized or possessed, which may remain after payment of all my just debts."

Early in the month of October then next ensuing, Jack died, leaving his will, so executed and published, in full force, and Susan Jack, as his widow, and Emily E. Jack, since intermarried with Edward H. Valentine, Martha M. Jack, since intermarried with William L. Little, Parmelia R. Gilbert, Mary E. Wood and Florence T. Jack, since intermarried with James E. Howe, as his only children, surviving him.

The will was, in a few days thereafter, duly admitted to

probate, and the widow elected to take under that instrument instead of under the statute.

The widow, also, went immediately into the possession of her late husband's one undivided third part of the mill and its appurtenances under the will, and so continued until the 16th day of July, 1874, when she sold, and, by warranty deed, conveyed said undivided third part of the mill tract of land, with the appurtenances, to Wallace Hibbits, the appellant herein, for the sum of \$9,000. The sale and conveyance were made as above upon the theory that the devise of the real estate, herein above set out, was in restraint of marriage, and consequently void, and that it had, in legal effect, been so held in the case of *Spurgeon v. Scheible* (43 Ind. 216), which had then but recently been decided, and that, in consequence, she, as widow, was the owner in fee simple of the real estate devised to her by the will.

Hibbits went into possession of the property thus sold and conveyed to him, claiming to be the owner in fee simple, and so remains in possession, having in the meantime made valuable improvements thereon. The widow still survives, and has never remarried.

This was a suit by Hibbits against the widow and children of John Jack, and the surviving husbands of such children, to quiet his title to the mill property so purchased by him, alleging that the defendants, other than the widow, claim to be the owners in fee simple of such property, and that they will be entitled to succeed to, and to enter into the possession of, the same after the death of the said widow, thus casting a cloud upon his title.

It is unnecessary that we shall notice all the pleadings and the proceedings upon each particular pleading. It is sufficient to state that the defendants, other than the widow, filed a cross complaint, substantially repeating the historical facts of the case contained in the complaint, alleging that the claim of Hibbits was a cloud upon their title, demanding that their title be quieted, and making Hibbits and the widow defendants to the cross complaint. Hibbits, answering the cross complaint, averred that at the time he purchased the interest in the mill

property in controversy, it had been held by this court that devises to the widow of a testator, precisely similar to the one involved in this case, conferred an estate in fee simple upon the devisee, and that this construction of such devises had been adopted by all the courts, and accepted and acted upon by all the citizens of this State; that it was consequently understood and believed by him that Susan Jack, the widow, was seized in fee simple of the real estate devised to her by her husband, and that the plaintiffs, in the cross complaint, acquiesced in that construction of their ancestor's will. Wherefore it was claimed that the plaintiffs, in the cross complaint, were estopped from asserting any claim of title to the property in dispute.

The Circuit Court sustained a demurrer to this answer, and the appellant declining to plead further, final judgment was rendered against him upon the cross complaint.

This and other rulings upon the pleadings present the questions: *First*. What estate did Susan Jack take under her late husband's will? *Second*. If only an estate during widowhood, then were her co-defendants below estopped from asserting any claim of title to the property conveyed by her to the appellant?

The last clause of section 2 of the act concerning wills, approved May 31st, 1852 (2 Rev. Stat. 1876, p. 571), which has ever since been in force (Rev. Stat. 1861, section 2567), reads as follows: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void."

Counsel for the appellant, with much ingenuity, as well as elaboration and ability, argue that the devise of real estate to Susan Jack, now before us, was in its very nature, and in its practical effect continues to be, a restraint upon marriage, notwithstanding some decisions of this court in analogous cases seemingly to the contrary, and the conclusion reached in the case of *Spurgeon v. Scheible* (*supra*), affords a precedent which ought to be followed, and which, in any event, must be considered as having entered into and become a part of the law of this case.

Whether the terms used in a devise or bequest ought to be

considered words of limitation only, or really words of condition, within the meaning usually attached to that phrase, constitutes very often a very difficult question for decision. For that reason many of the cases intended to illustrate the difference between words of limitation on the one hand, and words of condition on the other, are obscure, and sometimes apparently capricious and arbitrary. This results from the ever varying phraseology employed in making devises and bequests. But when questions involving that difference arise, the courts must decide them as best they can, having reference to established precedents and the fair meaning of the words to be construed, when taken in connection with the other parts of the will.

As illustrative of the difference in question, Sir William Blackstone states the rule to be as follows :

"If an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice ; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone." (2 Bl. Com. 121.)

And, continuing, at another place, says :

"A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For, when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*; as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made £500, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of £40 by the grantor, or *so that* the grantee continues unmarried, or *pro-*

vided he goes to York, &c.), the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate." (Vol. II, p. 155.)

In 2 Bouvier's Institutes, p. 272, section 1811, the same distinction is thus illustrated: "There is a marked difference between a condition and limitation, which should be remembered. A condition is a provision respecting a future and uncertain event, on the existence or non-existence of which is made to depend, either the accomplishment, the modification, or the rescission of a contract or testamentary disposition. In such case the estate or thing is granted or given absolutely, without limitation, but the title to it is subject to be divested by the happening or not happening of an uncertain event. For example, a man may give an estate to his wife, provided she shall continue to reside on it; or he may give it to her upon condition that she shall not marry.

"The first of these conditions is lawful, and if she remove from the premises she may forfeit the estate; but the last being in restraint of marriage is void, and the wife shall take the estate unconditionally.

"When, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally, with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation; as, if the estate is given *while*, or *as long as*, a woman shall remain a widow, or *until* she shall marry, the estate being given to her only during the time of her widowhood, and no longer, it determines by her marriage, and all her right to it is gone."

In 2 Washburn on Real Property, 4th edition, page 25, section 28, it is said: "The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that, where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition."

Tiedeman on Real Property, at section 281, says: "An estate upon limitation is one which is made to determine absolutely upon the happening of some future event, as an estate to A. so long as she remained a widow. The technical words, generally used to create a limitation, are conjunctions relating to time, such as, *during, while, so long as, until, &c.*"

In 2 Jarman on Wills, 566, the rule concerning limitations is thus stated: "But a bequest during celibacy is good; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage. This is not a subtlety of our law only; the civil law made the same distinction. And no gift over is required to make the restriction in this form effectual."

The item of the will of Harmon, particularly considered by this court in the case of *Harmon v. Brown* (58 Ind. 207), to which frequent reference has been made by counsel on both sides, was in the following words:

"First, I give and bequeath unto my beloved wife, Penina, during her widowhood, all my real and personal estate, to be held and freely possessed and enjoyed during her widowhood."

The widow, some years after the death of the testator, intermarried with one Brown, and the court below, in that case, held in effect that the item of the will set out contained words of condition in restraint of marriage, and gave judgment accordingly. This court reversed the judgment, holding that the words used in the item were words of limitation, and not of condition, and expressly overruled the case of *Spurgeon v. Scheible* (*supra*), to which reference has been made in so far as it seemingly recognized or established a different rule of construction. This case of *Harmon v. Brown* (*supra*) has either been cited approvingly, or expressly followed, by this court in the cases of *Coon v. Bean* (69 Ind. 474); *Stilwell v. Knapper* (69 Ind. 558; 35 Am. R. 240); *Brown v. Harmon* (73 Ind. 412); *Tate v. McLain* (74 Ind. 493); *O'Harrow v. Whitney* (85 Ind. 140).

The case of *Harmon v. Brown* (*supra*) followed the construction inferentially approved in the much older case of *Rumsey v. Durham* (5 Ind. 71), to which no reference is made in

Spurgeon v. Scheible (supra), and was, as it still is, supported by the prevailing, and, as it seems to us, unquestionable weight of authority. (*Coppage v. Alexander*, 2 B. Mon. 313; *Vance v. Campbell*, 1 Dana, 230; *Rodgers v. Rodgers*, 7 Watts, 15; *Doyal v. Smith*, 28 Ga. 262; *Pringle v. Dunkley*, 14 Sm. & M. 16; *Hawkins v. Skeggs*, 10 Humph. 30; *Chapin v. Marvin*, 12 Wend. 538; *Beekman v. Hudson*, 20 Wend. 53.)

In the case of *O'Harrow v. Whitney (supra)* this court held that where a husband dies, leaving a wife and two children surviving him, having first devised his land to his wife during widowhood, and she elects to accept the provision made for her by the will, her estate is limited in duration to the period of her widowhood, and that a purchaser, through a mortgage executed by the widow after a subsequent marriage, acquires no title to any part of the land. To that doctrine this court, as has been seen, is committed by a series of cases, and in the light of the authorities herein cited, and of others to which our attention has been called, from that doctrine we ought not to, and hence cannot now, recede.

Our conclusion, therefore, necessarily is, that the words used in the devise before us in this case, were words of limitation merely, and not of condition in restraint of marriage, and that, in consequence, the estate which Susan Jack took in the lands devised to her will not extend beyond the expiration of her term of widowhood.

In behalf of the position assumed by counsel for the appellant, that the decision in the case of *Spurgeon v. Scheible (supra)* became a rule of property, and, in that way, a part of the law of this case, they cite the following cases: *Ohio, &c. Company v. Debolt*, 16 How. 416; *City v. Lamson*, 9 Wall. 477; *Olcott v. Supervisors*, 16 Wall. 678; *Rowan v. Runnels*, 5 How. 134; *Havemeyer v. Iowa Co.* 3 Wall. 294; *Thompson v. Lee Co.* 3 Wall. 327; *Larned v. Burlington*, 4 Wall. 275; *Harris v. Jex*, 55 N. Y. 421; 14 Am. R. 285; *Robb v. Irwin*, 15 Ohio, 689, 703; and *Menges v. Dentler*, 33 Pa. St. 495.

But, as a careful examination will disclose, none of those cases have any practical analogy to the case at bar, resting, as does each one of them, upon an essentially different state of

facts, and having reference altogether to other kinds and classes of property.

The doctrine of *stare decisis* cannot be carried to the extent claimed for it in this case. The decisions of courts are not the law. They are only the evidence of the law, and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissensions of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. (*Hart v. Burnett*, 15 Cal. 530.)

Stare decisis does not mean adherence to the last decision of a court when so to adhere would be a desertion of the ancient and established law, and the principles underlying titles to real estate must rest upon a better and more stable basis than an erroneous judgment of a court.

A single decision, never called in question, but consistently acted on and generally acquiesced in for a series of years, may constitute a rule of property. While a line or very considerable number of interrupted and conflicting decisions do not.

Courts cannot, with propriety, perpetuate an erroneous decision, nor even a series of erroneous decisions, unless such decisions have become a recognized and well settled rule of property which the public interest requires shall not be disturbed. Whether a particular case or line of cases shall be overruled is always a question resting in the sound discretion of the court, to be decided with reference to the public welfare, and not to any merely private interest. (*Hart v. Burnett*, *supra*.)

The mere overruling of the principles announced in a given cause does not disturb property rights which have become vested under it. What was decided by a case afterwards overruled, continues to be the law of that case, as between the parties and those claiming under them. (*Hardigree v. Mitchum*, 51 Ala. 151; *Wells' Res Adjudicata and Stare Decisis*, section 628.)

Applying the several principles herein above enunciated to the case before us, the inference is evident that the case of *Spurgeon v. Scheible* (*supra*) never became either a rule of property or a precedent of binding authority in any subsequent case. The property rights of the parties to that case, and of

those acquiring interests under them, remain intact, but as to all other persons a different rule of construction in similar cases has both previously and subsequently prevailed, and must still be applied.

If the appellant was in fact misled by the case of *Spurgeon v. Scheible* (*supra*), it is a misfortune to be most sincerely regretted, but, upon the facts stated in the pleadings, he is without remedy in this action.

The judgment is affirmed, with costs.

Stilwell v. Knapper, 1 Am. Prob. R. 211.

MITCHELL vs. MORSE.

[77 Maine, 423.]

DEVISE IN FEE.—REMAINDER OVER.

A devise of real estate without words of limitation vests in the devisee an estate in fee-simple; and this result is not defeated by a devise over of the remainder.

ACTION to recover possession of lands.

H. L. Whitcomb, for plaintiffs.

S. Clifford Belcher, for defendant.

WALTON, J. This is a real action, and the only question is whether John Mitchell, by his last will and testament, gave his wife a fee-simple estate in the demanded premises, or only an estate for life.

It is the opinion of the court that he gave her a fee-simple estate. A devise of real estate without words of limitation vests in the devisee an estate in fee-simple; and this result

is not defeated by a devise over of the remainder. If a life-estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee-simple is given, the addition of a devise over of the remainder is void, because, the whole estate having already been disposed of, there is nothing for it to act upon. The argument usually urged against this conclusion is that the devise over ought to be allowed to cut down or reduce the estate previously given to a life-estate, upon the ground that such must have been the intention of the devisor. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder will not cut down the estate given to the first taker. (*Jones v. Bacon*, 68 Maine, 34; *Stuart v. Walker*, 72 Maine, 145.)

In this case, the testator first gives a few small legacies to his children. He then gives the residue of his personal property to his wife. He then declares that if the personal property is not sufficient to pay the legacies and the expenses of his last sickness, enough of his real estate may be sold to supply the deficiency. He then adds this clause:

"I give and devise to my wife, Sarah F. T. Mitchell, all the rest and residue of my real estate. But, on her decease, the remainder thereof I give and devise to my said children, or their heirs, respectively, to be divided in equal shares between them."

It will be noticed that in this devise there are no words of limitation. The gift is direct, positive, and absolute. And but for the devise over of the remainder, no one would doubt that under our statute (R. S. c. 74, § 16) the terms used are sufficient to convey an estate in fee-simple. The devise over is also direct and simple. It has no qualifying words or conditions whatever annexed to it. We thus have, first, a devise of a fee-simple estate, and then a devise over of a remainder. The two cannot co-exist. It is settled law in this State, as will be seen by the cases cited, that the latter must yield. The question is *res adjudicata* in this State, and will not be further discussed here.

The plaintiffs are the children mentioned in the secondary devise. The defendant has a warranty-deed from the primary devisee. His is the better title.

Judgment for defendant.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

See *Brown v. Merrill*, 2 Am. Prob. R. 148.

COLLINS vs. FOLEY.

[68 Maryland, 158.]

POWER TO LEASE.—LEASE FOR NINETY-NINE YEARS.—RULE AGAINST PERPETUITIES.

A devise of real estate to a trustee to hold for the benefit of testator's son during his life, and for the latter's children him surviving, "with full power to lease" "as he may deem advantageous and proper," authorizes a lease for ninety-nine years renewable forever.

A general power of leasing to persons *in esse*, the survivors and survivor of them, not extended to their representatives, does not infringe the rule against perpetuities.

ACTION to reform and specifically enforce an agreement for a lease.

Francis P. Stevens, Richard Bernard and Arthur W. Machen, for appellants.

S. Teackle Wallis, Jr., and *S. Teackle Wallis*, for appellee.

MILLER, J. The question whether the lessees will take a good title under the lease which the decree appealed

from in this case requires them to accept, depends upon certain clauses in the will, and codicil thereto, of Mrs. Emily MacTavish, which was admitted to probate in February, 1867.

By this will the testatrix devised all the rest and residue of her estate to her friend, "Daniel J. Foley, his heirs, executors and administrators in trust," in the first place to pay an annuity and a certain sum of money to her grandson, Francis Osborn MacTavish, and then "all the remainder of my estate of all sorts it is my will, and I hereby direct that my said trustee, Daniel J. Foley, and his representatives as aforesaid, shall take and hold to and for the use and benefit of my son, Charles Carroll MacTavish, for and during his life only, so that he shall have and enjoy the same, and the rents, issues and profits thereof without impeachment of waste; and from and immediately after his decease then to and for the use and benefit of all and every the children and child of my said son, Charles Carroll MacTavish, and their descendants (to take *per stirpes*) who shall be living at his death, their heirs, executors, administrators and assigns forever, the shares of such children and descendants who shall be females, to be, and they are hereby devised to, their sole and separate use respectively, to the same effect and with the same powers of disposition by deed or will in regard thereto as if they were *femes sole*, free from all control of any husband they may respectively marry, and from all responsibility whatsoever for such husbands, their debts or engagements." And then immediately following is this clause: "I hereby authorize and empower the said trustee, with the consent of my son, Charles Carroll MacTavish, during the life of the latter, and subject to the approbation of the Orphans' Court of Baltimore City after the death of my said son, to make such changes of investments of the rest and residue of my said property, and such reinvestments and changes from time to time as may in the judgment of said trustees be proper and advantageous, for which end I hereby authorize and empower my said trustee to do all lawful acts, and execute and deliver all needful deeds and instruments of writing in the premises, with the consent and authority aforesaid, *full power*

to lease being included herein." By a codicil to this will she makes provision that in case all the children of her said son should die before reaching the age of twenty-one and without lawful issue of any of them living at the death of the survivor of them, then, at the death of such survivor and of her said son, all the property devised to Daniel J. Foley in trust as aforesaid shall pass to her friend, the Reverend Thomas Foley, in fee, and to this provision she adds the following clause: "Lest there be any misunderstanding as to the powers of my said trustee, Daniel J. Foley, as to the leasing of the property by my said last will and this codicil devised to him in trust, I hereby declare it to be my intention, that with the consent and approbation in my said will prescribed and provided, he shall have full power and authority to make and execute *any and all leases whatsoever*, of any and all portions of the rest and residue of my estate which *he may deem advantageous and proper*."

Powers of leasing are very common in English settlements and wills. In that country every well prepared settlement and will of real estate, unless its value be inconsiderable, or the circumstances of the case do not require it, contains a power of leasing, and, as was said by Lord Mansfield in *Taylor v. Horde et al.* (1 Burr. 120), "of all kinds of powers this is the most frequent." The general rule of interpretation which prevails here, as in all similar cases, is that such powers must be construed according to the intention of the parties, and, as Lord Kenyon said, in *Pomery v. Partington* (3 Term Rep. 674), if judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them. (1 Platt on Leases, 394, 398.)

Applying this rule to the will before us, there seems to be no room for error or doubt. The testatrix was possessed of farming lands in the country, and of vacant, unimproved lots in the city of Baltimore. The only mode by which the trustee, under the powers given him, could make the latter (without

selling them) productive of income, was to lease them, according to the prevailing system of tenure in that city, under leases for ninety-nine years, renewable forever; and when she gave him the power to make "all leases whatsoever of any and all portions" of the residue of her estate which he might deem advantageous and proper, it is perfectly clear she intended he should have the power to make such leases of her unimproved city lots, and that, too, whether they were made for the purpose of changing investments or not.

But the validity of the power has been assailed, and, it is said, in the first place, that it infringes the rule against perpetuities. Without doubt, a leasing power may be so framed as to transgress this rule. Such was the character of the power in *Barnum's Case* (26 Md. 119), where the power given by the will to the trustees and their *heirs and successors* to make leases, was by *express terms* extended beyond the limits prescribed by the rule. But Mr. Lewis, in his admirable treatise on the Law of Perpetuity, in considering the rule as it affects the limitation and exercise of the powers of sale, exchange, partition, leasing, and the like, makes, among others, this deduction from the authorities, viz., that there can be no objection on the ground of remoteness to such unconfined powers, when limited to a person *in esse*, or several of such persons, and the survivors and survivor of them, and *not extended to their representatives*. In such case they resemble a springing use or executory devise, to arise within the compass of a life in being, and like these executory limitations, they in no degree transgress the perpetuity boundary. (Lewis on Law of Perpetuity, 554.) And such, according to our interpretation of it, is the limitation of the power in this case. If there is any provision in the *will* indicating that it was the intention of the testatrix that this particular power should devolve on any successor of Mr. Foley in the trust, that provision is superseded by the *codicil*, in which the leasing power is given to him *nominatim*, "my said trustee, Daniel J. Foley," and is not extended to his heirs, representatives, or successors; so that the power continues during his life,

and no longer. But if we are in error in extending it thus far, the least limit of continuance that can reasonably be assigned to it is during the life of the son, and after his death during the minority of all his children in case he should die before they all attained the age of twenty-one years. The will and codicil both require the leases to be made with the "*consent*" of the son during his life, and "*subject to the approbation* of the Orphans' Court," after his death; and by requiring the approval of this court it may, perhaps, be reasonably inferred that it was her intention that the power should continue so long only as any of these children should be subject in any wise to the control of that tribunal. But whether we take the one limitation or the other makes no difference in this case, because either will cover the time at which the contract for the lease in controversy was executed.

But it is also argued that this leasing power is repugnant to the estates created by the will, and therefore void. It is admitted that Charles Carroll MacTavish, the son of the testatrix, died in March, 1868, leaving four children, all of whom are now living. The eldest of these children (a daughter) attained the age of twenty-one in June, 1875, and this event put an end to the executory limitation in favor of the Rev. Thomas Foley. Counsel for the appellants argue that these children took under the will a remainder in fee freed from the trust, and that any limitation or restriction upon their absolute power over it, such as a power of leasing in another, is repugnant to the nature of such an estate and void. If they are right in this, then it is clear that the leasing power is stricken down altogether, for there is no more reason for construing the will as creating a trust over the life-estate than there is over the estate in remainder. In order to sustain their position, the will must be read as making a direct devise to the son for life, with remainder in fee to his children, and attaching to the estates so created this leasing power in another. If, instead of this leasing power, there were annexed to such estates a condition against alienation, even for a limited time, the authorities cited by counsel would be applicable. In the case of *Man-*

debaum v. McDonell (29 Mich. 76), where the question is elaborately discussed by Judge Christiancy, the will created a life-estate, with remainder in fee to certain named devisees, and imposed the condition that the property should not be sold until the youngest of the devisees attained the age of twenty-five years, and the court held the restriction void, and that a restriction which would suspend all power of alienation of such an estate, even for a *single day*, is inconsistent with the estate granted, unreasonable and void. This was followed by the recent English case of *Rasher v. Rasher* (Law Rep. 26, Chan. Div. 801), where a testator devised an estate in fee to his son, provided that if he wished to sell it during the life of the testator's wife, she should have the option to purchase it at a sum which was about one-third of its market value, and it was held that this proviso amounted to an absolute restraint on alienation during the life of the testator's widow, and was void in law.

But neither of these cases is the one before us. Judge Christiancy, in discussing the question in his case, is careful to point out in the first place what it does not involve, and says: "It does not involve the question whether a restraint upon the sale of this property for an equal length of time might not have been rendered legally effective by the conveyance of the legal title to trustees in trust for the benefit of these devisees according to instructions as to the time of sale which might have been inserted in the will, in which case the validity of the restriction as to time would depend mainly upon the question whether the period exceeded that allowed by the rule against perpetuities." In the case before us there is just such a devise in trust. The testatrix devises the residue of her property to a trustee and his *heirs*, executors and administrators *in trust* to accomplish, in the first place, a specified purpose, and then directs that the trustee "*and his representatives*" shall hold the remainder of it for the *use and benefit* of her son during his life, and after his death for the *use and benefit* of his children; and she then gives to this trustee a leasing power which, as we have shown, does not offend the rule against perpetuities. This is quite different from

clogging a direct devise in fee, with a restriction upon alienation. In fact, one of the principal purposes of interposing the trust seems to have been to enable the testatrix to confer upon the trustee this leasing power, and we think it may be safely affirmed that in all the range of authorities no case can be found in which the validity of such a power, thus conferred and thus limited, has been questioned. Such powers are not only reasonable, but are sometimes necessary. Especially in a case like this where the estate disposed of consists largely of property, the income from which must consist of rent reserved under leases, and where infants are the beneficiaries. At all events the testatrix had the right to dispose of her property as she pleased, and this disposition of it does not, in our opinion, violate any established rule of real estate law.

The objection that the approval of the Orphans' Court has not been produced, although alleged to have been procured on the 15th of March, 1876, is answered by the fact that the decree from which they appeal requires the complainant, before tendering to the appellants the lease to be executed by them, to procure the approval thereof by the Orphans' Court of Baltimore City as provided by the will of Emily MacTavish.

Having taken this view of the case, it becomes unnecessary to determine whether, under the proper construction of sec. 28, Art. 5 of the Code, and the terms of the decree or order of this court remanding the case under that section, when it was before us on the former appeal, it was competent for the appellants to raise the questions which we have thus considered and decided.

Decree affirmed and cause remanded.

GIBSON vs. SEYMOUR.

[102 Indiana, 485.]

DEVISE.—CONDITIONAL ON SURVIVORSHIP OF LIFE-TENANT.

A wife devised all her estate to her husband for life, providing, further, that if he survived her it should go to her step-daughter. The husband predeceased the wife, and the latter thereby died intestate.

ACTION for partition.

D. D. Dykeman and *D. C. Justice*, for appellant.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellees.

BLACK, C. On the 13th of November, 1879, Ruth A. Burrow, then the wife of Joseph M. Burrow, with whom she resided at Logansport, in this State, executed her last will and testament, whereby she made dispositions of property as follows:

“*First.* I direct that all my just debts and funeral expenses shall be promptly paid, as soon as possible after my death.

“*Second.* I hereby bequeath and devise to my beloved husband, Joseph M. Burrow, all my property, both real and personal, of every description whatever, for and during his natural life.

“*Thirdly.* At the death of my said husband, should he outlive me, or as soon as may be after my death without sacrifice of property, I desire that a suitable monument or monuments be put to all the graves; that they may be marked in an unostentatious manner: Harriet Farlow, who died January 30th, 1873; Mary Taintor, who died June 7th, 1873; Mahala Danforth, who died May 29th, 1879; Joseph M. Burrow and Ruth A. Burrow. The names may all be put on one monument if my executor and legatees are so disposed, and no use shall be made of my property or no income appropriated to personal use, until such monument or monuments shall be erected.

“*Fourthly.* If my husband survive me, I desire at his death

that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third. If I survive my husband, all or anything I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson. I promised \$20 to the W. F. M. Society; I have only paid \$5. This I consider a debt, and desire paid; also, desire that a locket worth at least \$5 be purchased for my namesake, and my picture be put in it, Ruth A. Washburn, if I have not given it previous to my death."

She appointed John F. Burrow as executor of said will. Her said husband died on the 17th of March, 1880, and she died on the 29th of July, 1880. Her said will was duly admitted to probate.

At the date of the execution of said will the testatrix was the owner in fee-simple of certain real estate in Logansport, and she still owned it at her death. She was the second wife of her said husband, by whom she had no children.

This was an action for partition of said real estate, instituted by the appellee, Charles E. Seymour, one of the heirs at law of said testatrix, against another heir at law and her step-children named in the will; and the question involved is, whether said real estate is the property of the appellant, said Harriet E. Gibson, or, as the court below decided, the property of the heirs at law of the testatrix.

By the second clause of the will the property in question was devised to the husband of the testatrix for his life. His death before that of the testatrix prevented the taking effect of this devise. By the second provision of the fourth clause she gave all the property of which she became possessed through his death to her step-children.

Other portions of the will directed the payment of her debts, the erection of a monument or monuments, the payment of what she had promised to the W. F. M. Society, and the purchase of a locket for her namesake; but the only disposition made of the real estate in question, except to her husband for

his life, was that contained in the first portion of the fourth clause, as follows: "If my husband survive me, I desire, at his death, that all I may own or be possessed of shall go to and become the property of my beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third."

This language is plain; its meaning is obvious. We are not at liberty to qualify or control such language in a will by conjecture or doubt arising from extraneous facts.

The devise of the real estate in question to the appellant is contingent in form, and no transposition of the language of the will, which does not modify the meaning, can be made so as to render the devise other than a contingent one.

We may conjecture that the testatrix failed through inadvertence to express her intention as she would have done if her attention had been called by another person to the matter about which the parties to this suit are now through it contending. But courts can no more make a portion of a will than they can make an entire will.

We cannot say that the testatrix by her will gave the real estate in question to the appellant in fee-simple merely subject to the life-estate previously given to the husband of the testatrix. She plainly made the devise of this real estate to the appellant contingent upon an event which did not happen.

She made no expression of intention in regard to this property in the event that she should survive her husband; and there is nothing left for us but to conclude, with the court below, that as to this property she died intestate.

Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellant.

ELLIOTT, J. We have carefully studied the briefs originally filed and those filed on the petition for a rehearing, and cannot find any reason for departing from the rule declared in our former opinion.

The rights of the appellant to the property she claims depend upon the construction of the will of her step-mother, Ruth A. Burrow. The will, set out in our former opinion, de-

vises to the appellant's father and the testatrix's husband an estate for life in her property, makes provision for the payment of debts, for the erection of monuments, and for the appointment of an executor. The only provisions in the will which directly affect the appellant are the following :

"*Fourthly.* If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third. If I survive my husband, all or anything I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson."

If it were not for the earnestness and apparent sincerity of counsel, we should not feel justified in devoting additional time or space to the question, for, to our minds, it is clear that the provisions of the will are not doubtful or obscure. In one event only is Harriet E. Gibson to take the property of her step-mother, the testatrix, and that is in the event that the husband of the testatrix should survive her. We cannot inquire why the step-mother chose to make the devise to her step-child depend upon the contingency of the father's survival. It is not the duty of the courts, nor is it within their power, to search for the reasons which influenced a testator to annex a condition to a devise; their duty is to ascertain whether there is a contingency, and its character and effect. The devise to Mrs. Gibson is made to depend upon the contingency of her father outliving his wife, and the courts cannot destroy the force of a clause so clearly and fully framed as the one before us.

There is no absolute devise to Mrs. Gibson, and unless the court inserts such a devise in the will, she cannot take the property of the testatrix. Not only is there no absolute devise, but there is a conditional one, and the contingency is the event of the survival of the husband of the testatrix. It is a familiar rule that the express mention of one thing implies the exclusion of all others, and under this rule it must be held that expressly making the devise depend upon the happening of a given event

excludes the inference that the devise was intended to be an absolute one.

Mrs. Gibson can only take as the will provides, and as the will makes the devise depend upon a contingency, she cannot take absolutely. She can claim only under the will, for she is not an heir, and can take only upon the condition expressly created by the will, and as that condition failed, so, also, did her claim as sole devisee.

We are bound to adhere to the words of the will unless there is doubt, confusion or obscurity, and there is nothing of the kind here. Redfield says there is no rule of construction "of more universal application, both here and in England, than that the plain and unambiguous words of the will must prevail, and are not to be controlled, or qualified, by any conjectural, or doubtful constructions, growing out of the situation, circumstances, or condition, either of the testator, his property, or his family." (1 Redf. Law of Wills, p. 430.)

Another author says: "Devises, limited in clear and express terms of contingency, do not take effect, unless the events upon which they are made dependent happen." (1 Jarman's Wills [4 Am. ed.], p. 743.)

At another place this author says: "An estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to these consequences." (1 Jarman's Wills, p. 744.)

The authorities are not divided upon the proposition that courts cannot, except in the clearest cases, change by transposition, alteration, subtraction or substitution, the words of a will, but must take them as they are written. (*Shimer v. Mann*, 99 Ind. 190, see auth. cited, pp. 195, 196 [50 Am. R. 82]; *Rupp v. Eberly*, 79 Pa. St. 141; *Yearnshaw's Appeal*, 25 Wis. 21.)

The language of the will gives Mrs. Gibson the whole estate only upon the condition that the husband of the testatrix survives her. No precise form of words is necessary to create a condition. As said in *Stilwell v. Knapper* (69 Ind. 558; 35

Am. R. 240): "The word 'condition' is not necessary to the creation of a condition. Any words that convey the proper meaning will create a condition." (See page 570.) There are many cases illustrating this general doctrine and applying it to cases like the present. In the well considered case of *Yearnshaw's Appeal* (*supra*) the question was considered and decided as we have decided it.

In the case of *Illinois Land and Loan Co. v. Bonner* (75 Ill. 315) it was said: "Did Bogle and Trulear take anything under the will? We are of the opinion they did not, for the reason that the contingency upon which they were to take never happened. They were to take only 'in case both said sister and brother should die without issue prior to attaining the ages of eighteen and twenty-one respectively.' The sister and brother did both die without issue, but they did not both die prior to their attaining those ages respectively. One did, and the other did not, the brother dying before reaching the age of twenty-one, but the sister, not until after having reached the age of eighteen. The terms of this devise over are clear, and free from the least ambiguity. It seems plain that the devise is contingent upon the fact of both Rosalie and Percy dying before reaching the ages of eighteen and twenty-one respectively.

* * * The testatrix did not in her will provide for the events that have happened, that is, of her sister dying over eighteen and the brother under twenty-one. In such case, the court will not provide for the unforeseen events. 'Where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause; conceiving it would be too much like making a will for the testator, rather than construing that already made.'" (2 Roper's Legacies, p. 1464.)

We have perhaps cited more authorities upon this branch of the discussion than necessary, but we have been induced to do so by the zeal and earnestness of counsel.

Counsel for appellants complain that their authorities were not discussed, and infer that they were not considered. Their

inference is erroneous; it does not follow that because authorities are not discussed in detail, in the opinion, that they have not had consideration.

Many authorities are cited to the effect that courts must ascertain and give force to the intention of the testator, and we yield undoubting assent to this familiar and rudimental doctrine, but we cannot perceive that it aids counsel, for all the authorities agree that the intention is to be gathered from the language of the will; that it must be the testator's intention as thus manifested that is given effect, and not the views of the court as to what the will should have provided, and that the court cannot supply words to give the instrument a different meaning from that which the language used ordinarily conveys.

It is contended that the intention of the testatrix was to make a disposition of her entire estate, and, therefore, that she intended to make an absolute devise to Mrs. Gibson. There is in this argument a plain fallacy; the conclusion does not follow from the premise, and the premise is not well assumed. The words of the will give an estate to Mrs. Gibson on a contingency, and not otherwise, and it cannot be assumed that the testatrix meant the reverse of what she says. Granting, however, the justice of the assumption, the conclusion does not follow, because the intention was not to dispose of the estate to Mrs. Gibson, except upon a certain event, and the inference is that what was not so disposed of went to the heirs. (*Waugh v. Riley*, 68 Ind. 482.) The presumption in such a case as this is in favor of the heirs, and where an estate is devised to a stranger upon a contingency, the contingency must happen, or the heirs will succeed to the estate of their ancestor. The general rule upon this subject is thus stated: "It is a well known maxim, that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." (1 Jarman's Wills, 465; *Rupp v. Eberly*, *supra*.)

We are referred to the cases of *Allen v. Mayfield* (20 Ind. 293), *Richmond v. Vanhook* (3 Iredell's Eq. 581), *Dunlap v.*

Dunlap (4 Desaussure, 305), *Coleman v. Hutchenson* (3 Bibb, 209), in support of the proposition, that "a legacy to one person for life with remainder to another does not lapse upon the death of the first taker during the testator's life," but these cases, it is evident, cannot exert any influence here, for the question is not whether the devise to the husband lapsed, but whether the contingency upon which Mrs. Gibson was to take ever happened?

We are asked to construe the will "as if Joseph M. Burrow," the husband, "had not been named," but this we cannot do, for the words of the will are: "If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson." To strike out the provision creating the contingency would make the will express a meaning entirely different from what its framer intended. The case of *Jackson v. Hoover* (26 Ind. 511) is essentially different from the present, for there the persons who claimed the estate were the children of the testator; it appeared that he meant to make provision for them all, and there was no language creating a condition as there is here.

The case of *Womrath v. McCormick* (51 Pa. St. 504) is not in point. There the question was whether the remainder was vested or contingent, there was no question as to whether the devise was, or was not, a conditional one. The decision was put upon the doctrine of Mr. Fearn, that "It sometimes happens that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession." Here no estate at all is devised except upon condition that the husband shall survive the testatrix. The question is not when a remainder shall vest, but whether, if the designated contingency does not happen, there is any devise at all. Redfield defines a conditional devise thus: "A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event." (2 Redf. Wills, 283.) This describes

the devise contained in the will under examination, for the taking effect of the bequest depends upon the contingency of the husband of the testatrix surviving her.

The will does not, as is argued, simply fix the time when the devise shall take effect, but it provides that it shall not take effect at all until the happening of the designated contingency. Until that contingency does happen no estate passes. A standard author says: "Whenever it appears that the happening of an event, or the performance of an act, was intended to operate as a condition to precede the vesting of a legacy or devise, it is essential that the event happens, or the act is done, since no interest will previously vest in the legatee or devisee, as has been shown in the tenth chapter of this treatise." (1 Roper's Legacies, 750; 2 Powell's Devises, 251.)

Petition overruled.

See Page v. Frazer's Executors, 1 Am. Prob. R. 588.

HARKER vs. SMITH.

[41 Ohio State, 236.]

PROVISION FOR SERVICES TO ESTATE.—CONTRACT.—LEGACY.

A request by testator to his bookkeeper to take charge of the books of his estate and assist in the settlement thereof so long as his services may be necessary, with an allowance of a fixed salary payable monthly, constitutes a contract, and the executor may dismiss the beneficiary for improper performance of his duties.

ACTION to recover for services.

The material clause in deceased's will was as follows:

"I hereby request and desire William J. Harker, who has attended to my business, keeping my books and accounts, to continue to take charge of and keep the accounts of my estate for my executor and trustee, and in any way he can to assist in

the settlement of my estate, so long as his services may be necessary, and for such services I allow him a salary of fifteen hundred dollars per year, to be paid to him by my executor in monthly installments."

Cowan & Ferris and *Hoadly, Johnson & Colston*, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

McCAULEY, J. The liability of the executor to the plaintiff in error depends mainly upon the question, whether or not the provisions of item thirteen of the will gives him a conditional legacy.

A conditional legacy is defined to be "a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated." (2 Williams' Executors, 1258; 2 Roper on Legacies, 283.) The effect to be given to item thirteen of the will is to be determined by the manifest purpose of the testator in making the provision, rather than by giving force and consequence to any particular expression used in it. The evident purpose of the testator was not to give anything either directly or upon condition to Harker; but to appoint him to assist the executor and trustee of the will to perform certain duties to the estate at a stated salary. While the testator says, "for such services I allow him a salary of fifteen hundred dollars per year," that expression is used in reference to his services to be performed for the estate. If Harker had refused or become unable from any cause to perform the services, he could not have earned the salary. It was to be paid for the services. It was money to be earned, and if not earned not to be paid. It is urged that it is a legacy upon condition, the condition being that Harker should serve the executor in a specified way. Service in a specified way is the common way of earning a salary, and the money thus earned as the bookkeeper of the executor belonged to the servant because of the labor he had performed and not because of the provision of the will. The provision

that the salary shall be paid in monthly installments, indicates that payments shall not be delayed as legacies are, until the indebtedness of the estate is paid ; but be paid as the settlement of the estate progressed and as a part of the expenses of managing the estate.

Looking to all the provisions of this item of the will we are of the opinion that it does not provide a legacy for Harker, but is a testamentary appointment of a bookkeeper for the executor, at a fixed salary, and for such time as a bookkeeper was necessary in the settlement of the estate. The effect of the appointment would be that Harker had the right to the salary, if he tendered performance of the duties of bookkeeper, while a bookkeeper was necessary to the executor, even though the executor refused to accept his services ; and that after the executor had accepted his services, the same relation as to services and salary and discharge would exist between them as if he had been employed by the executor himself, upon the same terms and conditions specified in this item of the will.

Harker was to be the bookkeeper of the executor, in matters pertaining to the estate. And any misconduct or unfaithfulness or incompetency on his part would justify his discharge the same as if he had been selected and employed by the executor himself. He was acting under the executor and subject to his reasonable control and direction. The executor was charged with the care and management of the estate, and if the bookkeeper thus employed to assist in its affairs no longer acted in the interest of the estate, his discharge by the executor was lawful and proper.

If Harker was wrongfully discharged and could have found employment, or did have employment, whatever he realized or could have realized from it, should be deducted from the salary he was prevented from earning by the discharge.

The Superior Court seems to have treated the provision of the will as a provision in the nature of a legacy, and held that Harker was entitled to the monthly allowance, if he offered to perform, whether his services were necessary or not, and whether they were valuable or not.

The District Court adopted the same view as to the legal effect of the provision of the will, but held further that the Superior Court had not jurisdiction of the action, because it was an action against an executor to recover a legacy, before the right to recover it had been fixed by a finding of the Probate Court. If the provision, however, was not a legacy, as we think it was not, the Superior Court had jurisdiction of it, and, in that aspect of the case, it becomes necessary to consider some of the proceedings upon the trial, to determine whether the court erred in overruling a motion by the defendant for a new trial.

The Superior Court, upon the trial, instructed the jury "that the defendant by his answer admitting that this provision was made, admitting that the plaintiff entered upon the discharge of his duties, and continued to discharge them until the 15th day of April, 1874, avers that he refused any longer to permit him to discharge those duties, first, because it was not necessary to have his services any longer in taking charge of or keeping the accounts of the estate for said executors and trustees named in said will, or to have him aid in settling the estate. Second, he says that the plaintiff collected and appropriated moneys of the estate and kept inaccurate accounts and failed properly to discharge his duties under the provisions of the will; that he became disagreeable and unpleasant in his manner and conduct toward this defendant; and that he also failed to obey the orders given him by this defendant, and that, by reason thereof and for the reasons aforesaid, he discharged him. Third, he sets forth that the plaintiff entered into a combination with certain persons to defeat the will of John Bates; but, as I have already ruled in the course of the trial, that would not authorize the defendant to refuse to permit him to discharge the duties, and you will not consider that portion of the answer." This instruction practically withdraws from the consideration of the jury all matters of defense, in an action other than one for the non-payment of a legacy, to which the right of the plaintiff was complete beyond all conditions.

The defendant, upon the trial, requested the court to instruct the jury "that Mr. Smith, the executor, had a right to

discharge Mr. Harker or refuse longer to employ and pay him if he refused to obey his lawful orders, if he was negligent and unskillful in keeping the accounts of the estate, if he absented himself improperly from the place of business, the office, and neglected its duties, for improperly retaining or using money of the estate," which request was refused by the court and was not given. The refusal to give this instruction prevented the defendant from having proper and pertinent matters of defense considered, and was error. The motion of the defendant for a new trial should have been sustained, not for want of jurisdiction as held by the District Court, but for error in overruling the motion of the defendant for a new trial.

Judgment affirmed.

BELLOWS vs. SOWLES.

[57 Vermont, 164.]

AGREEMENT NOT TO OPPOSE PROBATE OF WILL.—PROMISE BY
EXECUTOR TO ANSWER FROM HIS OWN ESTATE.

An agreement by an heir at law not to oppose the probate of a will on the executor's promise to pay him a sum of money therefor, is founded on sufficient consideration and is not within the statute prohibiting actions to enforce promises by executors to answer damages out of their own estate.

ASSUMPSIT.

Defendant in person, *H. S. Royce* and *L. P. Poland*.

George A. Ballard, Farrington & Post, Wilson & Hall
and *Noble & Smith*, for plaintiff.

POWERS, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the

consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the Statute of Frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the Statute of Frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities, or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the Statute of Frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: "No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate."

This *special* promise referred to is, in short, any *actual* promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer *damages* out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the *testator's* estate, for which the executor promises to pay damages out of his *own* estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principal, with the following clause, namely: "No action, etc., upon a special promise to answer for the

debt, default or misdoings of another." And so Judge Royce, in delivering the opinion of the court in *Harrington v. Rich* (6 Vt. 666), declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute:—that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a *guaranty*; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds (p. 150), says: "In the fourth section of the Statute of Frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so, on page 184, he interprets "to answer damages" as equivalent to *to pay debts of the decedent*. This seems to be the construction given to the statute by Chief-Justice Redfield, in his work on Wills. (Vol. II, p. 290 *et seq.*)

The Revised Statutes of New York (Vol. II, p. 113) have improved upon the phraseology of the old statute as we have adopted it, by adding, *or to pay the debts of the testator or intestate out of his own estate*.

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. (*Templeton v. Bascom*, 33 Vt. 132; *Cross v. Richardson*, 30 Vt. 641; *Lampson v. Hobart*, 28 Vt. 697.) Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the *principal* or *immediate* object of the promisor is not to pay the debt of another, but to *subserve some purpose of his own*, the promise is original and independent, and not within the statute. (Brandt's Snr. 72; 3 Par. Cont. 24; Rob. Fr. 232; *Emerson v. Slater*, 22 How. 28.)

And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

Pierpoint, J., in delivering the opinion of the court in *Cross v. Richardson* (*supra*), says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the *executor* of that estate whether it was to be divided according to the will or by the law of descent. If the subject-matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject-matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, therefore, in this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument of fraud. As in this case, the plaintiff would be deprived of his legal right to contest the will by a party who has reaped all the benefit of the transaction and is shielded from responsibility by a technical-

ity. We do not believe this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer, and adjudging the declaration sufficient, is affirmed, and case remanded with leave to the defendant to plead on the usual terms.

Promises to pay money in consideration of an heir's engagement not to contest.—In the case of *Bellows v. Sowles*, 55 Vt. 391, where the action was brought by the heir against the beneficiaries under the will to enforce a promise made by them to pay him money if he would contract not to contest the will, it was held that such a promise, namely, an agreement by beneficiaries under a will with an heir at law, who is disinherited by the will, but threatens to contest the will on the grounds of fraud and undue influence, to pay him money as a consideration of his desisting from such a contest, is a valid contract, and can be enforced, provided the heir had reasonable grounds to think that his claim was well founded. It is argued in the opinion that "the compromise of a doubtful right is a sufficient consideration for a promise, and it does not matter on whose side the right ultimately turns out to be." And further on the court says: "The plaintiff was heir at law of Hiram Sowles. He was interested in whatever disposition he made of his property. He had the right to oppose the establishment of any will made by him when offered for probate. Not being a legatee or devisee in the will of Hiram Sowles, it was for the plaintiff's interest to prevent the establishment of the will. The defendant was named executor in the will, and his wife and daughter were special legatees, and his wife the residuary legatee. He was, therefore, interested in the establishment of the will. Hence, if the plaintiff had any reasonable *bona fide* ground to oppose the establishment of the will, and forebore to exercise such right at the request and because of the promise of the defendant, such promise would be founded upon a good consideration. There was evidence tending to show such forbearance and promise. By such forbearance the defendant gained what was of value to him—the establishment of the will without delay or opposition, and at less expense—and the plaintiff lost what might be of value to him—the opportunity to oppose its establishment—either of which was a good consideration for the promise. It was not necessary for the plaintiff to allege and prove that his ground of opposition to the will would have been found sufficient to have defeated its establishment. It was enough if he had an honest, reasonable ground of opposition, and intended to use it, and forebore to do so on account of the defendant's promise."

In *Templeton v. Bascom*, 33 Vt. 132, it was decided that, where the defendant, being sole heir to an estate, promised the plaintiffs, who had a valid and undisputed claim against the estate, that, if they would take no steps to enforce their claim he would pay it very soon, or on demand, the promise was valid, and not within the Statute of Frauds, inasmuch as it was founded on forbearance, and not upon the consideration of a debt of the deceased.

SWAN vs. HAMMOND.

[188 Massachusetts, 45.]

REVOCATION BY MARRIAGE.—STATUTORY PROVISIONS.

Under a statute regulating the revocation of wills, and providing that nothing in it "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator," the marriage of a woman revokes existing wills.

PROCEEDINGS to probate a will.

E. F. Dewing and *G. L. Sleeper*, for appellant.

W. B. Gale and *W. N. Mason*, for executrix.

COLBURN, J. It appears by the record and agreed facts in this case, that Susan E. Haven, an unmarried woman, made her will, May 20, 1853; that she was then possessed of real and personal estate, all of which by her will she devised and bequeathed to her sister, who was named as executrix; that on October 3, 1861, she married Thomas F. Hammond, and lived with him until her death on January 18, 1883. Her husband had no knowledge of the existence of the will until after her decease. No child was born of the marriage. The will was presented for probate in Middlesex, by the executrix therein named, and was approved and allowed on April 3, 1883, and the husband appealed. The only question presented is whether the will was revoked by the marriage.

It has been well settled at common law, at least since *Forse & Hembling's Case*, decided in 1589 (4 Rep. 60b), that the marriage of a *feme sole* revokes her will. In case of a man it is equally well settled that marriage alone does not revoke his will, but that marriage and the birth of a child do. (1 Jarm. Wills, 122; *Warner v. Beach*, 4 Gray, 162.)

The reason why the will of a *feme sole* is revoked by her marriage is commonly stated to be, that marriage takes away her testamentary capacity, and destroys the ambulatory nature of her will; and it is urged in argument, that, since the statutes allowing a married woman to make a will, with certain limitations as to the rights of the husband, were passed, the reason upon which the rule was founded, that the will of a *feme sole* is revoked by marriage, no longer exists, and that her will, like that of a man, should be held to be revoked, not by marriage alone, but by marriage and the birth of a child. This argument is not without force, but its force would be much greater if we could see any good reason why in the case of a man both marriage and the birth of a child should be held necessary for the revocation of his will. The rule was adopted from the civil law, and is now firmly established as part of the common law; but the reason upon which it is founded is not obvious.

Marriage alone in the case of a man or woman would seem to be a sufficient change in condition and circumstances to cause an implied revocation of a will previously made. A will made before marriage, and taking effect after marriage, must take effect in a very different manner from that in the mind of the testator when the will was made. The rights of the husband or wife must greatly modify its provisions; and it can hardly be supposed that an unmarried person would make the same will he or she would make after marriage. If we were under no restraint, we might well hesitate to hold that, since testamentary capacity has been given to women, a will made by a woman when *sole* should be revoked only by marriage and the birth of a child, as in case of a man, for the sake of uniformity only, when we are inclined to think a better rule would be, that, in case of a man, his will should be revoked by marriage alone. But such a rule can only be introduced by the Legisla-

ture. In England, by the Stat. of 7 Will. IV & 1 Vict. c. 26, § 18, and in many of the States in this country, it has been provided by statute that the wills of both men and women shall be revoked by marriage. (See collection of statutes in 1 Jarm. Wills [5th Am. ed. by Bigelow], 122, note.)

But we are of opinion that the question now before us has been so far settled by statute as not to admit of change by construction. Section 8 of the Pub. Stats. c. 127, after providing that no will shall be revoked, unless by burning, tearing, &c., or some other writing executed in the manner required in the case of a will, goes on as follows: "but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not apparent that an entire revocation by implication of law results from any change of condition or circumstances, except that of a subsequent marriage. (See the discussion in *Warner v. Beach*, *ubi supra*.) This clause as to implied revocations was first introduced in the Rev. Stats. c. 62, § 9. The other provisions as to revocation were substantially taken from the Stat. of 1783, c. 24, § 2. The commissioners in their note to this section say: "The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us." And their further discussion of this subject shows clearly that they had in mind the rule of the common law, that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made.

We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change, even if the reason for the rule, in case of a woman, no longer exists. This was the view taken in *Brown v. Clark* (77 N. Y. 369) upon a similar question, under a statute of New York.

We are therefore of opinion that the will of Susan E. Hammond was not properly admitted to probate.

Decree of Probate Court reversed.

HEIGHE vs. LITTIG.

[68 Maryland, 301.]

PARTNERSHIP PROFITS.—LIFE TENANT AND REMAINDERMAN.

Testator died during the continuance of a copartnership agreement which was to last for a term of years, even if he died. His will devised the residue of his estate to his wife for her use during life, with remainder over. *Held*, that the life-tenant was entitled to all testator's share in the profits of the firm during its continuance.

ACTION for an accounting.

W. C. Schley and *Bernard Carter*, for appellants.

Nevett Steele, for appellee John R. Ross.

S. Teackle Wallis, for appellees Littig and wife.

YELLOTT, J. From the bill of complaint and the proof embodied in the record, it appears that Charles H. Ross departed this life on the 20th day of January, 1861. Prior to his decease, and on the 21st day of November, 1860, his last will and testament was executed, to which was subsequently added a codicil on the 29th day of December, in the same year. By the terms of these testamentary dispositions of his property, after making provision for the payment of debts and some small legacies, he gave all the rest and residue of his estate to his wife and her successors, in trust for her sole and separate use and benefit during her natural life, with a proviso that if any one of his sons should attain the age of twenty-one years, during the life of his mother, he should be paid the sum of \$5,000 out of the estate; this proviso being applicable to each son who should reach that age while his mother was living. And an annual payment of three hundred dollars was directed to be made to each daughter, who should marry during the life of her mother.

After the death of his wife the testator gave one-sixth of the trust estate thus created, to each one of his six children, the sons each to have \$5,000 at the age of twenty-one years, and the remainder of the sixth at the age of thirty years. It was provided that the daughters should receive the income from their respective portions of the estate, thus divided, during their lives, after which the principal was to go to their children; and in the event of there being no children, then to their surviving brothers and sisters. If any of the sons died before receiving the whole of the share or shares thus assigned the remainder was to go to the surviving brothers and sisters.

The eldest son of the testator died intestate, unmarried and without issue, in the year 1880. He had not, at the time of his death, attained the age of thirty years. The third son died soon after the testator, being then an infant, unmarried, without issue and intestate. The four children of the testator now living are Mrs. Heighe, Mrs. Littig, a daughter Fannie, at this time an inmate of an insane asylum, and John R. Ross, a resident of Baltimore county.

Clara A. Ross, the widow and executrix of said testator, died in May, 1881. She left a will by which she bequeathed all she possessed, with the exception of some small legacies, to her son John and her two married daughters; and by the terms of said will constituted her said son John her executor.

The complainants are manifestly entitled to the relief asked for in their bill of complaint. It is necessary that a trustee should be appointed to take charge of the estate and to completely execute the trust created by the will of said Charles R. Ross. They have also a right to ask that the defendants account with them; that the inventory be corrected; and that the exact amount of the *corpus* of the estate be, as far as possible, ascertained and established.

The only remaining question to be determined by this court is in relation to what should constitute the *corpus* of the estate. This question was ably argued by learned counsel on

both sides, but does not seem to present any very great difficulty.

Mr. Ross, the testator, bequeathed his property to be held by his wife, in trust for her own use and benefit, during the term of her natural life. She was, therefore, entitled to the income of the estate; for, if it were otherwise, the bequest would have been nugatory and unproductive of benefits. As she had a life-estate, she was entitled to the *whole* income in the absence of any restrictions in the will. She could not, however, appropriate any portion of the capital to her own use. Just before his death, Ross had entered into a copartnership which was to continue for three years, and even in the event of his death, to be carried on until the end of that period. It is conceded that he had invested about \$41,000 in this enterprise. This capital was the only portion of his property which was productive, and very large profits seem to have been derived from the transactions of this partnership. It is contended by the appellees that these profits should be merged in the *corpus* of the estate, while the opposite party hold that they belonged to the life-tenant. There would have been but little difficulty in coming to a satisfactory conclusion in relation to the question thus involved in controversy, if Ross, instead of investing his capital of \$41,000 in a profitable mercantile enterprise, had purchased a productive farm in the county of his residence, and, by his will, left it to his wife for life, and then in equal parts to his children. In that case, no one would undertake to dispute that the life-tenant was entitled to all the income derivable from this investment. She could not diminish the value of the investment by committing waste, neither could she be required to increase the value by taking a portion of the income and investing it for the benefit of her successors. In determining the respective rights of parties it is difficult to perceive a substantial distinction between this supposed investment in land, and that in a commercial copartnership. The profits of capital constitute income which inures to the life-tenant. Sound reason leads to this conclusion, and in support

of so plain a proposition, the citation of numerous adjudicated cases would seem to be unnecessary.

The dividends of the copartnership were distributed among the members of the firm in conformity with the terms agreed upon at the time of its formation. The larger portion of these dividends inured to the representatives of Charles R. Ross. But dividends do not constitute a part of the *corpus* of an estate any more than interest on money constitutes a portion of the principal invested. It has been held that the words dividend and income used in a will bequeathing stock mean the same thing. (*Reed v. Head and others*, 88 Mass. 177.)

Where a trust has been thus created for the benefit of some one for life the principle seems to be established beyond controversy that the ordinary profits and natural increase go to the life-tenant. (*Sutton v. Crane*, 10 Gill & J. 458; *Harvard College v. Amory*, 26 Mass. 446; 2 Perry on Trusts, §§ 544, 545.)

The rule, so strenuously contended for on the part of the appellees, is only applicable in case of an extraordinary bonus or addition to the usual income of stock or other property settled in trust for the benefit of one for life. It has no application to the ordinary revenue or income derived from any investment, no matter how large such revenue or income may have become by successful management. (*Reed v. Head and others*, 88 Mass. 176; *Clayton v. Gresham*, 10 Ves. 288; *Paris v. Paris*, Ib. 185; *Brander v. Brander*, 4 Ves. 800.)

There is, therefore, apparent error in that portion of the decree of the court below, which determines that any part of the dividends or income derived from the partnership, or any other investment of capital, should be added to the *corpus* of the estate.

While the widow was entitled to no portion of the capital sum invested, she was entitled to the income as already defined and designated. In all other respects the said decree of the Circuit Court seems to be correct and proper.

It must, therefore, be affirmed in part and reversed in part,

and the cause remanded, so that proceedings may be had in conformity with the principles enunciated in this opinion; the costs to be paid out of the trust fund.

Decree affirmed in part, and reversed in part, and cause remanded.

See *Richardson v. Richardson*, *ante*, page 352, and cases in note at page 356.

SOWERS vs. CYRENIUS.

[39 Ohio State, 29.]

CHARITABLE USE.—INDEFINITENESS.

A residuary bequest "for the preaching of the gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ. The preaching to be well and faithfully done" in specified cities, creates a valid trust enforceable in equity.

PETITION for construction of will.

The material provision of the will is as follows:

"Item 3. At the decease of my wife Esther, I give and bequeath all my estate, real and personal, for the preaching of the gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ. The preaching to be well and faithfully done in Lorain county, in Birmingham; and at Berlin, in Erie county, Ohio, and I nominate and appoint John Cyrenius, Silas Wood and Samuel Steadman, executors of this item of my last will and testament and I request them to do the business without remuneration."

N. L. Johnson, for plaintiff in error.

Pennewell & Lamson and *Geo. P. Metcalf*, for defendants in error.

UPSON, J. The decisions in the courts of this country and of England, in cases involving the power of courts of equity to enforce charitable trusts, and the validity of such trusts, are numerous and somewhat conflicting. But they have been fully considered in several cases heretofore decided by this court, and need not now be reviewed. It is only necessary to state the conclusions at which we have arrived.

Gifts for charitable purposes have always been favored, and trusts created for such purposes are carried into effect by courts of equity upon general principles of equity jurisdiction.

In the case of *Urmey's Executor v. Wooden and others* (1 O. S. 160) it was decided that the courts of chancery in this State, independently of the statute of charitable uses (43 Elizabeth), have jurisdiction to enforce such trusts, and the existence of that jurisdiction has not since then been questioned.

Among the charitable trusts which have been most liberally construed and most uniformly sustained, have been those created for the promotion of religion and education. It is clear from the language used by the testator in the third item of his will, that he intended his property to be used, after the death of his wife, for the promotion of religion by the preaching of the gospel of Christ, as taught by the denomination known as the Disciples of Christ. The object thus stated is claimed to be vague, indefinite, and uncertain, but the authorities decisively show that this claim cannot be sustained. We need only refer to the decisions of this court in the cases of *Urmey's Executors v. Wooden (supra)* and *Miller v. Teachout* (24 Ohio St. 525). In the former case the residue of the estate was devised to "the poor and needy, fatherless, &c., of Jefferson and Madison townships," of Montgomery county. In the latter case, the residue of the estate, after the death of the testator's wife, was to be appropriated and used "for the advancement and benefit of the Christian religion." In neither of those cases was the object of the trust defined with greater certainty than in this.

It is no objection to the validity of the trust that the indi-

viduals to be benefited by it are not designated in the will, for this indefiniteness is a necessary characteristic of charitable trusts. It is only required that discretionary power to use the property for the purposes intended by the testator should be given to trustees appointed by him, or by the court. In this instance that power has been plainly given by the testator to the persons named as executors in the third item of the will. Although the language of the will might have been more definite, the intention is clear and the trust valid.

It is next insisted that the estate was not devised, or intended to be devised, to the trustees. It is true that the estate is not devised in express terms, but the weight of authority is in favor of the proposition that courts will by construction imply an estate in trustees, although none is given them in words, in cases where they are required to do something which can not be done without a legal estate, and that the estate thus implied will be an estate sufficient for the purposes of the trust. In this case the purposes of the trust obviously require an estate in fee, and that estate would, under that rule, be implied, by construction, in the trustees. It is unnecessary, however, to decide whether an estate in fee was taken by the trustees, or not, for even if the legal estate descended to the plaintiff in error, it descended subject to the trust, which could still be enforced against it. This was decided in the case of *Trustees of McIntyre Poor School v. Zanesville Canal and Manufacturing Co.* (9 Ohio, 203), and also in the case of *Williams v. First Presbyterian Society of Cincinnati* (1 Ohio St. 478).

It is next insisted that the appointment of Parmley and Robinson, as trustees, was invalid. If this were true, the plaintiff in error would not be prejudiced thereby, for the trust might still be executed by Cyrenius, the surviving trustee; but we are of opinion that under the provisions of the act relating to wills (S. & C. 1630, §§ 66, 67) the Probate Court was authorized, in a proper case, to appoint suitable persons to aid in executing the trust according to the will, although there might be a surviving trustee capable of executing it, and that this power was properly exercised in this case. There is nothing

in the language of the will to indicate that the power given to the first trustees is a *personal* trust and confidence, that cannot be exercised by others, and there is nothing in the nature of the trust to prevent its execution, in accordance with the intention of the testator, as well by trustees appointed by the court as by those named in the will.

Judgment affirmed.

YOUNGER vs. DUFFIE.

[94 New York, 535.]

SIGNING AT "END OF" WILL.

A signing by testator at the end of the attestation clause is a subscribing "at the end" of the will as required by statute.

ACTION to establish a will.

John N. Lewis, for appellant.

Emmet R. Olcott, for respondent.

EARL, J. This action was brought under section 1861 of the Code of Civil Procedure to procure a judgment establishing an instrument as the last will and testament of Alfred N. Duffie. The complaint, among other things, alleges that Duffie, late United States consul at Andalusia, in the kingdom of Spain, temporarily residing at Cadiz in that kingdom, but an inhabitant of and domiciled in the county of Richmond and State of New York, died on the 8th day of November, 1880, at the city of Cadiz, and that he was at the time of his death possessed of personal property within the State of New York; that the plaintiff is a legatee under his will; that prior to his death, and on or about the 28th day of January, 1880, Duffie, at the city of Cadiz, duly signed, published, declared and exe-

cut before a notary, and in the presence of, and with three witnesses, his last will and testament; and that, on the 1st day of May, 1881, before the same notary and the same three witnesses, he also signed, published, declared and executed a codicil thereto, a copy of which will, together with the codicil, is annexed to the complaint and made a part thereof, the original will and codicil being in the Spanish language and in the kingdom of Spain; that they were duly executed in conformity with the laws of Spain, and remain on file among the archives of the notary's office at the city of Cadiz, from which the same cannot, by reason of the laws of Spain, be taken for the purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever. The disposing part of the will is divided into seven paragraphs, and between the end of the last paragraph and the signature of the testator is the following language: "In testimony whereof I so execute the same at the city of Cadiz, on the 28th day of January, 1880. And the testator whom I, Ricardo de Pro y Fajardo, a notary of this district, and of the illustrious College of Seville, do certify that I know, thus said executed and signed, with the witnesses present, who were Salvador de Aspres, Salvador Ramirez and Manuel Ceneles, all of this vicinity, I having read to all of them this will, after first notifying them of the right which they have by law to verify the same themselves, which right they renounced, he not exhibiting his personal certificate by reason of the office held by him, all of which I certify." Then follows the signature of the testator, the three subscribing witnesses and the notary. The codicil was executed in substantially the same way. The defendant, Mary Ann Pelton Duffie, the appellant, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term, and the judgment of the Special Term was affirmed at the General Term, and then she appealed to this court.

Section 1861 of the Code provides as follows: "An action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, in either of the following cases." The first case is as follows: "Where a

will of real or personal property, or both, has been executed in such a manner, and under such circumstances, that it might, under the laws of the State, be admitted to probate in a Surrogate's Court, but the original will is in another State or country, under such circumstances that it cannot be obtained for that purpose, or has been lost or destroyed by accident or design before it was duly proved and recorded within the State." It is conceded that this case comes within this provision, provided this will was executed according to the formalities prescribed by the laws of this State. But the objection is made that the will was not "subscribed by the testator at the end thereof."

The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose. What shall form part of the instrument which the testator intends as his will must be determined by him. It is true, as claimed by the learned counsel for the respondent, that a proper definition of a will is an instrument by which a person makes a disposition of his property, to take effect after his decease. But every word contained in the instrument may not relate to or bear upon the disposition of property. It is not uncommon for the testator to recite in the will his religious faith and hopes and the moral or prudential maxims which have guided his life, and to give directions concerning his body, and to make many declarations which have no bearing whatever upon the disposition of his property; and yet they are all part of the instrument which he intends as his will. Such matters and declarations are usually inserted at the commencement of the will, but they may as well be placed after the disposing parts of the will; and yet if the signature in such case is placed below them, it is at the end of the will, within the meaning of the statute. So, too, ordinarily what is called the attestation clause, when it follows the signature, is no part of the will. (*Jackson v. Jackson*, 39 N. Y. 153.) It is not essential to the validity of a will, and as it follows the signature, it cannot be taken as a part thereof. But if the

testator chooses to insert the attestation clause before his signature, thus making it a part of the instrument, then, like any other matter contained in the will which does not relate to the disposition of property, it becomes a part of the instrument called a will. If the testator, beneath the disposing part of the will, and before his signature, should insert the Apostles' creed, or the Lord's prayer, it would be part of the instrument called a will, and although it would intervene between the signature and the disposing part of the will, it could not be contended that the will was not subscribed at its end. So it is common in the execution of wills to insert just before the signature, a testimonium clause as here, "in testimony whereof I so execute the same, at the city of Cadiz, on the 28th day of January, 1880." That is strictly no part of the will; it is not essential to its validity, the date being of no importance, and yet it never has been doubted that the signature beneath such a clause would be at the end of the will; and so it would be if the recital were much longer and fuller. Here the testator chose to have inserted before his signature the language of the notary, reciting the mode of execution, and the names of the witnesses, and the fact that the will was read to all of them. He thus chose to make that a part of the instrument, and his subscription beneath it was a subscription at the end of the will.

The case is not within the mischief intended to be guarded against by the statute. There is certainly no authority in this State holding that such a subscription is not at the end of the will. In *McGuire v. Kerr* (2 Bradf. 244), and in *In re Will of O'Neil* (91 N. Y. 516), portions of the will succeeded the signature of the testator, and hence in each of those cases it was held that the will was not subscribed at the end thereof. In *The Matter of Gilman* (38 Barb. 364) it was held that an instrument was signed at the end thereof, "where nothing intervenes between the instrument and the subscription." Here nothing intervenes between the instrument and the name of the testator.

We must, therefore, hold that this will was subscribed at the end thereof, and that it was provable in the Surrogate's Court

of Richmond county, but for the fact that it could not be procured for that purpose, and hence this is a case within section 1861, wherein an action to establish the will is authorized.

It is not important to determine, and we do not determine whether or not this action could be maintained under the second subdivision of section 1861; and the conclusion we have reached also renders it unimportant to determine the question raised by the motion to dismiss the appeal.

The judgment should be affirmed, with costs, but with leave to the defendant, Mrs. Duffie, upon payment of costs, to answer the complaint within twenty days.

All concur.

Judgment accordingly.

See Will of Hewitt, 3 Am. Prob. R. 58; Flood v. Pragoff, Ibid. 69; Will of O'Neil, Ibid. 135, and cases in note on page 142.

WISTAR vs. SCOTT.

[105 Pennsylvania State, 200.]

DEVISE TO "MALE ISSUE."

Under a devise to "the male issue then living of testator's son R.," all the male lineal descendants of that son then living should take, whether of the same generation or not, and irrespective of their ancestors being male or female.

ACTION of ejectment.

John G. Johnson and *Samuel T. Jaquett*, for plaintiffs in error.

Joseph B. Townsend and *J. Sergeant Price*, for defendants in error.

STERRETT, J. The single question presented by this record has been so fully and satisfactorily discussed by the learned president of the Common Pleas that little, if anything, can be profitably added to what he has said in the clear and exhaustive opinion upon which the judgment of that court is based.

After devising the "Prospect Hill" lot to his daughters Catharine and Sarah "for and during all the term of their natural lives, and the life of the survivor of them," the testator disposed of the estate in remainder in the following words: "And from and immediately after the decease of the survivor of them, I give the same unto the male issue, then living, of my said son Richard, their or his heirs and assigns in fee; but if no such issue shall then be living, in such case I give the same unto all the children of my said daughters Catharine and Sarah and my son Richard, their heirs and assigns, in equal parts, according to the number of them."

The remainder thus devised was clearly contingent, because it was to a class not in existence, either at the date of the will, or when it became operative in 1821 by the death of the testator. Moreover, testator's son Richard, to whose male issue the estate in remainder was given, was not married until June, 1824, and the survivor of the life-tenants lived until September 21, 1886.

The word "issue" in a will, *prima facie*, means the same as heirs of the body, lineal descendants indefinitely, and is to be construed as a word of limitation; but the *prima facie* construction gives way if there is anything on the face of the will to show that the word was intended to have a less extended meaning, and to be applied to children only, or, as in this case, to lineal descendants of a particular class in being at a specified time. (*Slater v. Dangerfield*, 15 M. & W. 263.) The phrase, "male issue of my son Richard then living," is a *descriptio personarum*, designating the class of persons to whom the remainder in fee was given upon the termination of the particular life-estate; and the question is, who composed that class when the survivor of testator's two daughters died, September 21, 1886; in other words, who, according to the true

interpretation of the will, were the male issue of son Richard living at that time? The case stated there were, in all, only six male lineal descendants of then in being, viz., his two sons, Richard and W. plaintiffs in error, and his four grandsons, John M., and Alexander H. Scott, the defendants in error, and his daughter Fanny, and Richard W. Hopkinson, a son and daughter Sarah.

The contention of defendants in error is that the "male issue," as employed by the testator, included male lineal descendants above named, grandsons as well as sons, notwithstanding the fact that four of them were not of sons, but of daughters of testator's son Richard. If this position is correct, it follows that the judgment in favor for the three undivided sixth parts of the land in controversy is right. On the other hand, the plaintiffs in error contend that the words mean children, male children, not male descendants generally of Richard, or that they mean the male issue of Richard, tracing their descent through males only.

As has been clearly shown, in the opinion referred to, the word issue, in legal parlance, means lineal descendants, irrespective of their being of the same generation. In our several Acts of Assembly regulating the descent and distribution of real and personal estate of intestates, the words "issue" and "lawful issue" have always been employed as synonymous with lineal descendants, including not only the first, but more remote generations as well. So, also, in a class of cases, which *Eichelberger v. Barnitz* (9 Watts, 449) belongs, where a testator devises, in terms broad enough to pass a fee-simple, and then reduces to a fee-tail by a subsequent provision limiting the estate to another in the event of the first taker dying "without issue," or "without leaving issue," etc., the word issue, under a general rule, is never held to mean children, but lineal descendants generally; and being thus a limitation over upon indefinite failure of issue or lineal descendants, such devices have always been construed to create an estate-tail. When, in the present case, the word is manifestly used as descripti-

of the devisees, and is also restricted to such issue as shall be living at a specified time, it is always construed as a word of purchase, embracing all lineal descendants of the person named, in being at the time so specified, unless it clearly appears from the context that the testator intended otherwise. This principle of construction appears to be fully sustained by the authorities, among which are the following: *Haydon v. Wilshere*, 3 T. R. 372; *Hockley v. Mawbey*, 1 Ves. Jr. 150; *Freeman v. Parsley*, 3 Ves. 421; *Leigh v. Norbury*, 13 Ves. 340; *Wythe v. Thurlston*, Ambler, 555; *Davenport v. Hanbury*, 3 Ves. 257; Hawkins on Wills, 187, 188; *Cook v. Cook*, 2 Vern. 545; *Bradshaw v. Melling*, 19 Beav. 417; *Ross v. Ross*, 20 Id. 645; *Miller's Appeal*, 2 P. F. Smith, 113; *Coyle's Appeal*, 2 Norris, 242. In *Leigh v. Norbury (supra)* the court said: "It is clearly settled that the word 'issue,' unconfined by any indication of contrary intention, includes all descendants. Intention is required for the purpose of limiting the sense of that word and restraining it to children."

Several classes of cases, in which it has been decided that such intention was sufficiently indicated, are exceptions to the general rule, depending on the peculiar features of each case. One of them is where a precedent estate or interest was given to the parent of the children who were held to be intended by the word issue. In such cases the devise to his issue has been likened to a legal succession in right of the parent. *Bradshaw v. Melling (supra)* and *Robinson v. Sykes* (23 Beav. 40) are illustrations of this class. In the latter case the Master of the Rolls said: "I am of opinion that though the word 'issue' is *nomen generalissimum*, and includes all the remotest descendants, that nevertheless, where issue are pointed out as persons to take with reference to the share of the parent, a gift, which so far as regards the parent 'fails, they take on the principle which may be called a *quasi*-representative principle; that is, the children of each parent, whose share fails, take that parent's share, but not admitting the grandchildren to take in competition with children." Whenever it is apparent, from a consideration of the whole will, that the testator intended to restrict the gift to children, it will be so construed. In the case before

us there is not the slightest indication of such intention. Testator's son Richard, whose name is used merely as descriptive of those to whom the estate in remainder was given, had no interest under his father's will, or otherwise, in the land in controversy. The devisees did not take through or under him; but, as a defined class, they took as purchasers by direct gift from the testator. There is nothing in the phraseology of the will to indicate an intention to restrict the words "male issue" to the sons of Richard, or to his male issue, tracing their descent through males only. If the word "male" had been omitted, it would scarcely be claimed that all the lineal descendants of Richard, both male and female, in being at the time designated, would not have been included in the description. The only effect of that word is to exclude female lineal descendants.

For these and other reasons, more fully elaborated in the opinion of the court below, we think the judgment should be affirmed.

Judgment affirmed.

SECURITY COMPANY *vs.* BRYANT.

[52 Connecticut, 311.]

ABATEMENT OF BEQUEST IN LIEU OF DOWER.

A bequest in lieu of dower accepted by election has priority over all other legacies and will not abate with them.

ACTION to construe a will.

H. C. Robinson and *C. E. Gross*, for appellant.

J. R. Buck, for appellees.

LOOMIS, J. The principal question for review in this case relates to the construction of the third, fourth and fifteenth clauses of the will of Gardner P. Barber, deceased.

The third clause is as follows: "I give, devise and bequeath unto my beloved wife, Abby H. Barber, to her and her heirs forever, the sum of fifty thousand dollars, the same to be in lieu of dower." The fourth clause gives \$25,000 in trust to Mrs. Barber, for the use of Lizzie G. Barber (an adopted daughter), and after her death the principal sum to be paid to her children, but if no children survive her, then \$5,000 of the principal sum is to be given to her husband and the balance to Mrs. Barber and her heirs. Following this are nine clauses containing as many legacies of money to different persons, aggregating twenty-one thousand dollars, making in all ninety-six thousand dollars of legacies payable in money.

There is a general bequest of the rest and residue of the estate, both real and personal, to his wife, and then follows the fifteenth clause, which is as follows: "I hereby make, constitute and appoint my beloved wife, Abby H. Barber, and Caleb M. Holbrook, to be executors of this my last will and testament; and I hereby direct my said executors that if my said estate shall not be sufficient to pay in full the aforesaid legacies, then the devise to my beloved wife, Abby H. Barber, and to Abby H. Barber in trust for Lizzie G. Barber, shall be paid first and in full, and the other devises *pro rata*."

Mrs. Barber accepted the provisions of the will. The record shows that the assets of the estate do not exceed forty-eight thousand dollars with which to pay legacies calling for ninety-six thousand dollars.

The precise question in controversy is, whether the two legacies, to Abby H. Barber \$50,000, and to Abby H. Barber, trustee for Lizzie G. Barber, \$25,000, abate *pro rata*, or whether the widow has the preference by virtue of her position as purchaser of the testamentary estate given for the relinquishment of her dower.

The law is well settled by the uniform current of authori-

ties that a bequest in lien of dower, accepted by election, is so far based upon a valuable consideration that it has priority over all other legacies and will not abate with them. Such is the doctrine of this court in *Lord v. Lord* (23 Conn. 327).

But the learned counsel for the defendant suggested that the doctrine as to this State was not well founded, because the distinction between dower at common law and that which obtains in this jurisdiction had been overlooked. At common law the right attached to all the lands of which the husband was ever seized during coverture, while under our statute it attaches only to the real estate of which he died possessed. Upon this distinction it was argued that, while there would be a good consideration for the relinquishment of the dower where the common law prevails, there could be no valid consideration under our law. This argument assumed that the consideration must consist in the relinquishment of a title vested in the wife during coverture. This we think is a misapprehension. The consideration is the relinquishment of dower for the testamentary gift, but the contract is not made during coverture. The husband's offer of a price for his wife's legal estate is only made by the will, which takes effect upon his death, and the wife's acceptance can only be after that event; so that what the wife relinquishes by her election must be the dower estate which vested in her at her husband's decease. The consideration, therefore, is of the same nature precisely under our statute as under the common law, although under the latter it may happen to be of greater value, which fact has no materiality in the argument. When the wife accepts the offer in the will she parts with a vested legal estate, and takes, instead, the testamentary compensation by virtue of a contract then made. The result of our brief review is to confirm the old doctrine that the widow takes as a purchaser, and therefore we conclude that the legacy to her, constituting the purchase-money, must be paid in preference to other legacies, which, in the comparison, are considered mere bounties.

This, however, does not conclude the matter at issue. We

must again recur to the will to determine what price was offered for the dower, and upon what conditions. If the latter require the sum first named to be reduced, then the reduced sum is regarded as the price offered. But the fact that the wife takes her legacy as a purchaser will always be important when the words of the condition are of doubtful import or application. The offer of a specific sum in lieu of dower is always to be construed as if the words "to be paid in full in preference to all other legacies" were added; hence, if a subsequent condition does not make it clear that the testator intended to reduce the sum offered, it must stand with the preference attached. With these considerations in view, we come to the question as to the construction to be given to the fifteenth clause. Did the testator thereby intend to take away the preference which the law would otherwise give to his wife over the legacy to the daughter, and to make both legacies abate *pro rata* in the event of a deficiency?

We find no words which make such intent manifest, and the probabilities are all against it. It is evident that the contingency of a deficiency so great as to render it impossible to pay the legacies to the wife and daughter was never thought of, much less provided for. It was thought possible that there might be less than ninety-six thousand dollars, but no such shrinkage as to reduce the assets to seventy-five thousand. The testator therefore brought these nine items into one class to share a *pro rata* abatement, but where the testator made only one class subject to abatement, the defendant would make two. The claim for such a construction is founded on the words "to be paid first and in full," as applied to the legacies to the wife and daughter. These words, it is argued, place the two legacies in question on the same plane in the mind of the testator, not for the purpose of withdrawing them from the *pro rata* class, and preserving the status given previously in the will, but for the purpose of repealing (so to speak) the preference given by the law to the wife over the daughter. This view we cannot accept. The words import an undoubted belief in the mind of the testator that these two legacies

could, and therefore should, be paid in full; but it by no means follows that they indicate the mind of the testator in case they could not be paid in full. In case of a shrinkage of assets below the ninety-six thousand dollars called for to meet the eleven items in the will, the testator wanted the loss to fall on the more remote objects of his bounty, and not upon the wife and daughter; hence he very naturally said, for the purpose of protecting their legacies, and of leaving them just as they stood previously in the will, that they were to be paid first and in full, while the others should abate *pro rata*.

The rulings of the court rejecting certain parol evidence were so clearly right that we refrain from any discussion of the matter.

There was no error in the judgment complained of.

In this opinion the other judges concurred, except GRANGER, J., who dissented.

FIDELITY TRUST COMPANY'S APPEAL.

[Supreme Court of Pennsylvania, October, 1885; 2 Eastern Reporter, 261.]

SPECIFIC LEGACY.—WILL SPEAKING FROM DATE OF EXECUTION.

It is sufficient to constitute a specific legacy that the thing given can be specified and distinguished from the rest of testator's estate at the time of his death, even if not in existence or owned by him at the date of his will.

The words "now standing in my name on the books of the company," following a bequest of "eighty-one shares" of stock therein, are evidence of an intention to dispose of only the shares owned by testatrix when making her will, within a statute making every will speak and take effect "as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

PROCEEDINGS on accounting of executors.

The clause in the will of Julianna B. Carman discussed was

as follows: "I also give and bequeath eighty-one shares of the Provident Life and Trust Company of Philadelphia, now standing in my name on the books of said company, to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, in trust, to collect and receive the interest or dividends arising from the aforesaid eighty-one shares of the Provident Life and Trust Company, when due and payable, and apply the same to the support and maintenance of my grandson, Joseph Ruths, of Philadelphia, for and during the term of his natural life; and from and after the death of my said grandson, Joseph Ruths, in further trust to assign and transfer the aforesaid eighty-one shares of the Provident Life and Trust Company of Philadelphia, to my sister Harriet M. Severns, formerly Harriet M. Williams, of Philadelphia, her heirs and assigns forever."

At the date of testatrix's will, in February, 1881, the stock was of the par value of \$50 per share. In February, 1882, the capital of the company was increased and the par value made \$100 per share, each stockholder having the right to subscribe at par for an amount equal to their holdings. Testatrix surrendered her eighty-one shares, received a certificate for forty-one shares of a par value of \$100 each, and subscribed and paid for forty additional shares of like par value. She died possessed of these eighty-one shares.

William P. Gest and John Marshall Gest, for appellants.

James Alcorn, for appellee.

CLARK, J. By the act of 4th of June, 1879, § 1, it is provided that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Unless, therefore, a contrary intention appears by the will of Julianna B. Carman, executed 21st of February, 1881, it must speak and take effect as if it had been written immediately before her death, on the 18th of August, 1883; if it be read as so written, the eighty-one shares of the Provident Life and

Trust Company of Philadelphia, of the par value of \$100 per share, at that time standing in her name on the books of the company, are clearly comprised in the terms of the bequest to the Fidelity Company. Whether a contrary intention appears by the will is, therefore, the precise question to be determined.

The general rule of the common law was, that a will of realty was construed to speak from its date; real estate which the testator did not have at the time of the making of his will, but which he subsequently acquired, would not pass under it, however express, comprehensive and general the words of the will, or however manifest the intention of the testator. A will of personalty, however, was not referable to the state of the property at the time of the making of the will, but was construed to take effect from the date of the testator's death, unless there were expressions in the will showing it was intended to describe the property with reference to the former and not to the latter date. By section 10 of our act of April 10, 1833 (Purd. Dig. 1476, pl. 11), it was provided "that the real estate acquired by a testator, after making his will, shall pass by a general devise, unless a contrary intention be manifest on the face of the will." It will be seen that this section placed wills of realty and personalty on the same footing, in part only, and the first section of the act of 4th of June, 1879, above referred to, was enacted to complete what had only been partially effected by the act of 1833.

The bequest in the will of Julianna B. Carman is doubtless specific; it is of a particular thing, specified and separated from all other things, constituting the testatrix's estate. (*Walker's Estate*, 3 Rawle, 229; *Blackstone v. Blackstone*, 3 Watts, 335; *Ludlam's Estate*, 13 Penn. St. 275; *Walton v. Walton*, 7 Johns. Ch. 258.) If, at the testatrix's death, these shares had not been found, the legacy would have been redeemed, and, in case of deficiency of assets, it would not have been subject to abatement with general legacies. But a specific bequest may be of a particular thing, in existence and constituting part of the estate of a testator at the time of the making of his will, or it may be of a particular thing, of which he was not then possessed, but which he was possessed at his death. It is suf-

ficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease. (*Fontaine v. Tyler*, 9 Price, 94; *Stephenson v. Dowson*, 3 Beav. 342; 2 Redf. Wills, 133.) And legacies which would have been specific still before the statutes are specific. (*Bothamley v. Sherson*, L. R. 20 Eq. 304; s. c. 13 Moak's Eng. Rep. 814.) That the legacy is specific, is not, therefore, necessarily decisive of the question under consideration. It is in the application of the rule of the statute to specific legacies that we meet with most difficulty. No case in this court has been called to our attention which involves a construction of the act of 1879, or which defines the different measure of proof which may be required to establish a contrary intention under the statute from that which was adjudged sufficient before its passage. *Roney v. Stilts* (5 Whart. 381) was a decision under the act of 1833, but will be found to be in accord with the views hereinafter expressed with reference to the effect of the act of 1879.

The common law rule prevailed in England until the passage of the Wills Act of 1 Vict. chap. 26, 1838, the 24th section of which is identical in form with the first section of our statute of 1879. The several adjudications which had been made upon the former in the courts of England are important, therefore, in the construction which we should put upon the latter; these adjudications may indeed be supposed to have been in the mind of the legislature when this section of the English statute was incorporated into ours.

The rule as to wills of personalty at the common law, before the passage of the Wills Act, was generally expressed in language not greatly different from that used in the statute, but the effect of the statute, as to personal bequests, under the construction subsequently put upon it by the courts, was to require a clearer proof, and the use of more decided terms in the will, to establish a contrary intention. Thus, where, before the statute, the testator had bequeathed the whole of some one genus of his property, by the description of all his property of a particular kind, as "all debts due to me on bond," or "all my stock," or "my share," the courts had determined that he intended only so much as he had at the date of his will (*Douglass*

v. *Douglass*, Kay, 404), but, after the passage of the Wills Act, it was held in *Goodlad v. Burnett* (1 K. & J. 341) that the effect of that enactment was to require some plainer indication of contrary intention, and that therefore, where a testatrix in 1850 bequeathed "my new three and a quarter per cent. annuities," the bequest comprised all at her death.

So Vice-Chancellor Stewart, in *Langdale v. Briggs* (3 Sm. & G. 246), where the words designating the bequest were "the estates of which I am seized," said: "The words, no doubt, in the ordinary sense, being wholly in the present tense, refer to the date at which they are used. But it is because the language of wills is so much in the present tense, and used as speaking at the time of the date and making of the will, that the act of parliament has enlarged their interpretation beyond the present tense, and has declared that the will is to speak as if executed immediately before the testator's death. Even if the testator had said, 'I devise the lands of which I am now seized,' I can find nothing in the context showing an intention contrary to the rule of the twenty-fourth section of the act."

Referring to the several cases cited by the appellants in support of their contention here, we find that the language by which the bequests in each case are designated is of a generic character; that is to say, the bequests are of that which may be increased or diminished in the lifetime of the testator. In *Hepburn v. Skerving* (4 Jur. [N. S.] 651) the bequests were of "all the shares which I now possess in the C. Bank," of "the shares I am possessed of in the A. Bank," and of "the money I possess in the company's fund." Afterward the testator's property of these kinds was much increased, and although the words employed were in the present tense, qualified even by the adverb "now," the will was construed as having reference to the testator's death when the investment first became operative. In *Langdale v. Briggs* (*supra*) the bequests were of the estates of which I am seized; in *Lilford v. Keck* (30 Beav. 300), "all lands of or to which I am seized or entitled in fee-simple;" in *Trinder v. Trinder* (L. R. 1 Eq. 695), "my shares in the Great Western Railway;" in *Wagstaff v. Wagstaff* (L. R. 8 Eq. 229), "all my ready money, bank and other shares, and

any other property that I may now possess;" in *York v. Brown* (7 Ch. Div. 431), "all his messuages, farm lands and hereditaments situate in the parish of Great Bowden;" in *Bothamley v. Sherson* (L. R. 20 Eq. 304; s. c. 13 Moak's Eng. Rep. 814), "all my stock in the Midland Railway Company;" in *Everett v. Everett* (7 Ch. Div. 428; s. c. 23 Moak's Eng. Rep. 653, 659, note), a release of all claims in respect of certain advances made, and of "all other money due from him;" in *Russell v. Chill* (19 Ch. Div. 432), "all his share and interest in a certain partnership business, and of and in the real and personal estate employed or invested therein, and of and in the partnership debts, securities, and moneys to which he might be entitled at his decease;" *In re Ord* (12 Ch. Div. 22), "all his leaseholds situate," &c.

The several bequests in all these cases have, upon the same general ground already stated under the Wills Act, been construed to have reference to the death of the testators.

Other cases are cited, not strictly applicable to the question under consideration; in some of them the qualifying word "now" serves merely as a description of the subject-matter of a bequest, as *In re Midland R. R.* (34 Beav. 525); and in some the subsequently acquired estate was an outstanding or reversionary interest, or a renewal of a leasehold, in the property comprised in a devise, as in *Saxton v. Saxton* (13 Ch. Div. 359); *Miles v. Miles* (L. R. 1 Eq. 462); *Castle v. Fox* (L. R. 11 Id. 542); *Garrison v. Garrison* (29 N. J. L. 154); and *Struthers v. Struthers* (5 W. R. 809). To all cases of this character this construction of the act has without doubt been uniformly applied; indeed it would appear that they were in the contemplation of the law-making power when the Wills Act was passed. "The applicability of the new enactment to the case of a renewed lease," says Mr. Jarman, in his *Treatise on Wills*, page 606, "cannot be questioned, and its application has been extended to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee; the newly acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to

the term for which the property is at the time held ; this being considered only a mode of describing the property, and not as equivalent to saying, 'I give my present interest and nothing else.'” The same principle has been applied to a devise of land. Thus in *Stevens v. Bayley* (L. R. 8 Ir. 410), where the testatrix devised to the plaintiff “the lands of Curramore,” and devised all the residue of her real estate to the defendant. The town land of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty ; and after the date of her will she purchased the other portion. It was held that the whole town land passed to the plaintiff. Monahan, C. J., who delivered the judgment of the court, considered that the description comprised the whole town land, and, consequently, included all in the town land of which the testatrix was seized at her death.

But the bequest in the will of Julianna B. Carman is not of the whole of any class of her property—a specific gift of an undefined amount—as of “all my shares in the Provident Life,” &c. ; it is of “eighty-one shares” “now standing in my name on the books of the company.” The words employed are used in no merely generic sense ; the property is particularly specified by number and name. She had, at the time of making her will, just that particular number of shares, and when she speaks of them as she did, she manifestly refers to an actually existing state of things ; her language, therefore, must be taken as referential to the time of the writing of her will. The adverb “now,” if used in a bequest of “all her shares,” or “her shares standing,” &c., under the authority of the cases cited, would not, perhaps, have been sufficient to establish any “contrary intention,” as, in that connection, it would with equal propriety be referable to the date of the will or of the testatrix’s decease. But when the bequest is of a certain number of actually existing shares “now standing on the books of the company,” we may readily conclude that the testatrix intended to limit the bequest to the identical shares she then had ; if she so intended, then nothing else was given ; if she referred to an existing state of things she certainly did not give the forty

shares not then owned by her. It is true that the eighty-one shares were afterward changed to forty and one-half shares, but the question is not one of identity in number, but of the identity of the subject of the gift.

The case of *Cole v. Scott* (1 Mac. & G. 518) has been greatly relied on; in that case the gift, it is true, was of "all the estates of which I am now seized and possessed," but the testator's meaning of the word "now" was there ascertained from the use of the same word in other parts of the will; the context clearly showing that the testator alluded to the time of the making of his will.

It is not necessary, perhaps, that this contrary intention must be expressed in so many words, but it must be clear and free from doubt, on the fair construction of the will, and it is difficult, we think, to conceive of a case in which that intention is more plainly expressed than here.

For the reasons stated, we are of opinion that the court was right in confirming the adjudication of the account of the executrix.

The decree of the Orphans' Court is, therefore, affirmed, and the appeal dismissed, at the cost of the appellant.

MERCUR, Ch. J., and GORDON, J., dissent.

HOSPITAL TRUST CO. vs. COMMERCIAL BANK.

[Supreme Court of Rhode Island, January, 1885; 1 New England Reporter, 20.]

LIFE-ESTATE NOT ENLARGED TO FEE BY POWER OF SALE.—

MORTGAGE BY LIFE-TENANT.

Where in a will the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital during his life.

A gift for life with a superadded power of sale, and appropriation of the proceeds, does not confer a power to mortgage or pledge more than the donee's life-interest.

ACTION to construe a will.

Charles Hart and Joseph C. Ely, for complainant.

James Tillinghast, for respondent.

DURFEE, C. J. The bill shows that Mary R. Burnside, wife of General Ambrose E. Burnside, late of Providence, died March 9, 1876, leaving a will by which she devised and bequeathed all her property, real and personal, to General Burnside for life, "with full power and authority at pleasure to sell, transfer and convey any portion of my personal property and estate, execute the requisite conveyance and conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever." The will gives all the estate of the testatrix, remaining at the decease of General Burnside, to her mother for life, and then to other persons and charities. The will appoints General Burnside executor, and after his decease the complainant corporation. It was admitted to probate April, 4, 1876. General Burnside, having qualified as executor, filed an inventory of the personal estate, which was accepted August 21, 1877, and October 2, 1877, settled his first and only account, wherein he charged himself with the whole amount of the inventory, as "taken to myself for life, as per the will of Mary R. Burnside."

The personal property, as inventoried, was appraised at \$69,506 26, and consisted in part of forty-five eight and a half per cent. one thousand dollar bonds, appraised at \$45,000, made by one Simon B. Buckner, and secured by a trust mortgage of his real estate in Chicago to the Farmers Loan and Trust Company of the city of New York. The bonds were issued payable to bearer, but contained the following provision, to wit: "The holder of this bond may present the same at the office of said The Farmers Loan and Trust Company, for registration, and the same shall thereupon be registered in conformity with usage in such case, and thereupon it shall become and be payable, both principal and interest, to the order of said holder, or

to the bearer, as he may elect." After the probate of the will, General Burnside delivered eighteen of these bonds to the Commercial National Bank of Providence, as security for moneys lent. The eighteen bonds were registered under the provision therein by Mary R. Burnside, in her lifetime, in her name, and when pledged bore an indorsement under date of November 14, 1872, signed by the transfer agent, indicating that they were then transferred into her name. A copy of one of the bonds, annexed to the bill as a sample of all, likewise bears an indorsement under the date of November 21, 1876, indicating that it was then transferred to the Commercial National Bank of Providence; but the complainant alleges in the bill that it is ignorant of the form of the pledge. The bill, however, alleges that the pledge was made by General Burnside in his own name and to secure his own indebtedness, and that the bank took the bonds with full notice that they were a part of the estate of Mary R. Burnside, and that the General had no right or title in them other than that given him by her will. General Burnside died September 13, 1881, leaving said eighteen bonds still in pledge, and after his death they were paid, the money being received by the bank. On October 21, 1881, the complainant qualified as executor of the will of Mary R. Burnside, and afterward demanded of the bank the money received on the said bonds above the life-interest, if any, of General Burnside. The bank refused to comply with the demand, claiming that the General had full power to pledge the bonds. The bill also sets forth that one J. Howard Manchester has been appointed administrator on the estate of General Burnside, and that, as administrator, he claims the surplus of the money received in payment of the eighteen bonds, beyond what is necessary for the payment of the indebtedness to the bank, as belonging to the estate of General Burnside. The complainant brings this suit against the bank and said Manchester, as administrator, for a construction of the will, a determination of the rights of the several parties, for an account by the bank, and for a decree for such portion of the proceeds of the bonds as is due to it. The defendants have severally filed general demurrers to the bill.

The ground on which the defendant, Manchester, rests his claim is that the will of Mary R. Burnside bequeathes her personal estate, in legal effect, absolutely to her husband, the power of disposition given to him being inconsistent with, and destructive of, the limitations over. Some of the cases cited in support of this view are closely, if not exactly, in point. (*Bean v. Myers*, 1 Cold. 226; *Davis v. Richardson*, 10 Yerg. 290; *May v. Joynes*, 20 Gratt. 692; *Irwin v. Farrer*, 19 Ves. Jr. 86.)

We think, however, that where in a will the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital, at least when the power is only a power to dispose of or appropriate the fee or capital during his life. For, as has been well said, "An express bequest of an estate for life negatives the intention to give the absolute property, and converts the superadded right of disposition into a mere power." (*Denson v. Mitchell et ux*. 26 Ala. 360.)

Of course we ought, if possible, to construe a will according to the intention of the testator, and, in such a case, we have only to treat the power bestowed as power, and not as property, in order to give effect to the limitations over. And we think this view is best supported not only in reason but by authority. (4 Kent's Com. *435; *Jackson v. Robins*, 16 Johns. 537, 588; *Ayer v. Ayer*, 128 Mass. 575; *Burwell's Executors v. Anderson*, 3 Leigh, 348, 356-358; *Stuart v. Walker*, 72 Me. 145; *McCauley's Appeals*, 93 Pa. St. 102; *Flintham's Appeal*, 11 Serg. & R. 16; *Burleigh v. Clough*, 52 N. H. 267; *Pennock v. Pennock*, L. R. 13 Eq. 144; *Herring v. Barron*, L. R. 13 Ch. Div. 144; *Smith v. Bell*, 6 Pet. 68.)

Among these cases we direct attention particularly to *Burleigh v. Clough*, where the point is exhaustively examined and discussed. We, therefore, decide that the claim of Manchester, as administrator, cannot be sustained.

The next question is, whether the Commercial National Bank is entitled to apply the money received on the bonds,

beyond the interest accruing thereon during the life of General Burnside, to his indebtedness. We do not think it is necessary to the determination of this question to decide whether the bond of an individual, payable in terms to order or bearer, is negotiable, or whether the eighteen bonds after registration, if originally negotiable, ceased to be transferable by simple delivery; for, as the case stands, we feel bound to suppose that the indorsement of November 21, 1876, was made by the direction of General Burnside, and was as effectual to transfer the bonds, as against the obligor at least, as an indorsement by General Burnside himself would have been, and that the bank took them with notice that they were a part of the estate of Mary R. Burnside, and that he had no other title than was given him by the will, such notice being expressly averred. The bill also avers that the bonds were pledged or transferred to the bank by General Burnside in his own name, to secure his own indebtedness, so that we think the bank is precluded from claiming that the transaction was with him as executor. We also think that there is nothing in the bill to show that the complainant has been guilty of *laches*, or even of any unreasonable delay, in making its claim upon the bank. The question, therefore, on the pleadings as they stand is, was the power conferred on General Burnside by the will broad enough to authorize the transfer of the bonds to the bank as security for moneys lent to him?

The complainant has cited numerous cases in which a power to sell was held not to authorize a mortgage. The cases are mostly cases in which it was manifest, or at least inferable, that an out and out conversion of the property was intended, being cases in which the power was bestowed on trustees, agents, or executors, the power in several of them being a power to sell for re-investment. Undoubtedly such a power ought to be more strictly construed than a power given to the donee simply for his own benefit. (*Norcum v. D'Ench & Ringling*, 17 Mo. 98, 117; *Stokes v. Payne*, 58 Miss. 614.)

One of the cases cited, however, is a case where the power was given simply for the benefit of the donee, and where, not-

withstanding, it was held that the donee had no authority to mortgage. (*Hoyt v. Jaques*, 129 Mass. 286.)

We do not find among the many cases cited for the bank any case which holds that a power to sell authorizes a mortgage. There are a few such cases. (*Mills v. Banks*, 3 P. Wms. 1; *Wayne, Trustees v. Myddleton*, 2 Ga. 383; *Williams v. Woodward*, 2 Wend. 487, 492.) But in *Stroughill v. Anstey* (1 De G. M. & G. 635) Lord St. Leonards allows a mortgage under a power to sell only where the estate is settled or devised, subject to a particular charge, and the mortgage is made to raise the charge.

In *Bloomer v. Waldron* (3 Hill [N. Y.], 361, 367) the propriety of this exception to the rule is doubted, and the ground of the rule is stated as follows, to wit: "There is a substantial difference between raising money by mortgage and sale, and it is enough to say that a power to raise money by one of these methods puts a negative on the other." (See, also, *Butler v. Duncomb*, 1 P. Wms. 448, 452; *Ivy v. Gilbert*, 2 P. Wms. 13; *Mills v. Banks*, 3 P. Wms. 1.)

The difference between a mortgage and a sale is more marked now than it was formerly, and, therefore, it is more difficult now than formerly to construe a power to sell as including a power to mortgage. Even a chattel mortgage with delivery resembles a pledge more closely than it does an ordinary sale.

In *Bloomer v. Waldron*, the court also say: "The most we can say is, that when the power is to sell, and something is added over and above, showing that the power of sale is not to be taken in its primary sense, but means a power to mortgage, then the donee may act accordingly. The principal may always make his own vocabulary." And to the same effect is the language of the court in *Hoyt v. Jaques* (129 Mass. 286).

The question, then, is, is there anything in the will of Mary R. Burnside which shows that it was her intention that the power to sell should include the power to mortgage? Undoubtedly, the will evinces a generosity on her part toward her husband, which would have led her to give a power to mort-

gage, if it had occurred to her to give it; but did it occur to her, and if so, did she suppose that a power to sell included it? We find nothing in the will which enables us to answer the question affirmatively. She speaks only of a power to sell, and of "such sale or sales." Can we infer a power to mortgage from the character of the property, taken in connection with the language of the will? The property consists of bonds, mortgages, shares of stock, and money on deposit. It could be as readily sold as mortgaged. We notice only one matter which merits consideration. It consists in part of money on deposit. Undoubtedly General Burnside had authority under the power to draw this money and use it without a sale, for, as the only purpose of a sale is to convert into money, the law will not require a sale when the purpose is accomplished without it. If General Burnside had lived until the Buckner bonds fell due, we have no doubt that it would have been competent for him to receive payment and appropriate the proceeds, so far as he needed, to his own use, without going through the form of selling them, because selling them, in that event, would be but an idle form, which the law would not exact. And so, too, if the eighteen bonds transferred to the bank had fallen due and been collected and applied by the bank to the payment of General Burnside's indebtedness during his lifetime, we think the application would have been valid, for it would have been the same, in legal effect, as if General Burnside had himself collected and so applied them. But why, it may be asked, if this be so, is not the application by the bank after his death equally valid? The answer is, because the application after his death is no longer his application, the pledge or mortgage being ineffectual as such for more than his life-interest; and immediately after his death the will carried all of the personal estate bequeathed, which remained unapplied by him to his use, over to the legatees in remainder. This is not the conclusion which, considering the circumstances, would give us the most satisfaction, but we do not see how we can escape it. If only a power be given, then only *the* power can be used, and not another, the donee having no other.

The demurrer of the defendant, Manchester, will, therefore,

be sustained, and the bill dismissed as to him, with costs, and the demurrer of the bank overruled.

Decree accordingly.

The following cases were cited by complainant's counsel to sustain the proposition that a power to sell does not authorize a mortgage: *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Haldenby v. Spofforth*, 1 Beav. 390; *Devaynes v. Robinson*, 24 Beav. 86; *Bloomer v. Waldron*, 3 Hill (N. Y.), 361; *Alb. Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Ferry v. Laible*, 31 N. J. Eq. 566; *Patapsco Guano Co. v. Morrison*, 2 Woods, 395; *Stokes v. Payne*, 58 Miss. 614; *Henderson v. Blackburn*, 104 Ill. 227; *Switzer v. Wilvers*, 24 Kan. 388; *Cunningham v. Blake*, 121 Mass. 338; *Hoyt v. Jaques*, 129 Mass. 286; *Loring v. Brodie*, 134 Mass. 453; *Wilson, Trustee v. Maryland Life Ins. Co.* 60 Md. 150.

PHENIX vs. LIVINGSTON.

[New York Court of Appeals, March, 1886; 4 Eastern Reporter, 307.]

DOUBLE COMMISSIONS.—COMMISSIONS OF TRUSTEES OF LIFE-ESTATE.

Executors who are also testamentary trustees are entitled to commissions in both capacities where the will contemplates a severance of their duties and a point of time when that severance should take place.

Trustees of real estate for the life of another, not being vested with the fee, are entitled to commissions only on moneys passing through their hands, and not on the value of the fee of the property.

THE opinion states the case.

J. F. Kernochan, for appellants.

Wm. B. Ross, for respondents.

FINCH, J. There are but two questions in this case, and both may be considered without reviewing the complicated details of the trust accounts. These questions are whether the executors, who were also trustees, become entitled to commissions in both capacities; and if so, whether the trustees' commissions are to be computed upon the value of the real estate. The first of these questions must be answered by subjecting the facts established to the test of the rules adjudged in *Johnson v. Lawrence* (95 N. Y. 154) and *Laytin v. Davidson* (Id. 263). In the first of these cases double commissions were refused, for the reason that the will contemplated no separation of duties on the part of the executors and no transfer to, or holding by them of any portion of the estate in the character of trustees; while, in the second, double commissions were allowed, upon the ground that the will did contemplate a severance of duties and a point of time at which those of the executors would be ended and those of the trustees begin. In that case the severance of the trust funds from the general assets contemplated by the will had taken place; so much of the estate as was needed for debts, legacies and expenses had been to those purposes appropriated, and the balance having been ascertained by a settlement of the executors' accounts, became and was adjudged to constitute a trust fund to be further held and managed as such. Within the doctrine of these cases, commissions in both capacities were properly allowed in this. The will contemplated a severance of duties and a point of time when that severance should take place. At the beginning of the instrument, after directing the payment of debts and expenses, the testator names six persons "executors of, and trustees under this, my last will and testament." They were first to act as executors of the will and then as trustees under it. A series of separate trust estates are then constituted, running for the lives of specified beneficiaries. Some of them required specific sums to be set apart, and others, and more important ones, provided in very careful detail for a severance of purely trust estates from the general assets and their further management and administration, not by the executors, but by five out of the six of them holding as trustees. Since a

serious portion of the trust estates consisted of real property, provision was made for a suitable partition for the purposes of the trusts, and a broad and abundant authority given for the management of the lands. The trustees were empowered to lease the improved property for a period not exceeding five years, and that which was unimproved for not more than twenty-one years. Authority was conferred to sell the lands in other States, the unimproved property in this State, and the dwelling-house, with the consent of the widow; and the trustees were authorized to rebuild structures destroyed or impaired, and erect new buildings upon unimproved property, so as to render it productive. A further provision of the will is quite significant. The trustees are empowered in their discretion, through the agency of a revocable power of attorney, to commit the management of certain of the trust estates to the beneficiary, but preserving in themselves the title and resuming control whenever they should deem it advisable. It is impossible to reflect upon these provisions of the will without a resultant conviction that the testator contemplated and provided for two separate duties to be performed by his representatives; one as executors and the other as trustees, the latter to commence at the termination of the former, and to begin with a severance of the trust estates from the general assets and to be held and managed thereafter by his executors, or some among them, in the capacity of trustees. Such a severance was in fact made. The accounts of the executors as such were settled, and there was left nothing but the trust estates to be managed for the beneficiaries. Separate accounts were opened with each, and they were held and managed for many years with a great amount of labor, with a large demand upon the care and patience of the trustees and with a very heavy burden of responsibility. We think it was a proper case for the allowance of commissions to the same persons, first in the character of executors and then in that of trustees.

The appellants, however, further insist that the commissions of the trustees should not be computed upon the value of the real estate, and the argument is that commissions are only

given upon sums of money, or their equivalent, received and paid out; that the trustees never received the fee of the lands, since that fee vested at once in the grandchildren, the trustees taking only an estate commensurate with their trust, which simply terminated, and was never transferred or paid over. We think this objection is well founded and that, as it respects real estate held in trust, the commissions of the trustees are not to be computed upon the value of the land which remains unsold. The office of a trustee was at first deemed honorary and without compensation, but our statute changed the rule and allowed compensation to executors, administrators and guardians at a fixed percentage to be computed upon all sums received and paid out. Trustees were not named specifically in the enactment, but they were held to be within the equity of the statute, and entitled to compensation as if included within it. To that we must, therefore, refer, and by that be governed in determining what allowance, if any, is to be made. Sums received and paid out are made the basis of computation. It has nevertheless been held that securities received by an executor and by him turned over to the parties entitled, might be treated as money received and paid out for the purpose of computing commissions. This was itself an extension of the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such for purposes of compensation. But we are asked now to take a step further, and give a new extension to the act, which does violence to its language, and makes land, in no just sense received or transferred, constructively money. The only authority for this doctrine is the case of *Wagstaff v. Lowerre* (23 Barb. 209) and a few cases in the Supreme Court, and the Surrogate's Court in the city of New York, which have followed it as authority. *Wagstaff v. Lowerre* was a special term decision. It cited as authority but two cases, neither of which justified the conclusion reached. In one of them (*Matter of De Peyster*, 4 Sandf. Ch. 511) the court said: "There is force in the argument that there is no well grounded distinction between lands and stocks as to the trustees' compensation," but the remark was uncalled for and

unnecessary for the purposes of the decision. The lands there in question had been bid in upon foreclosure of mortgages belonging to the estate, and in equity remained personalty, and were therefore treated as such in the hands of the trustees. The other case cited (*Mc Whorter v. Benson*, Hopk. 28) gives no indication that real estate was at all in question and the elaborate opinion of the chancellor aims only to show that the statute had fixed a definite rate of compensation for an executor's services; a rate computed upon the sums of money received and paid out; and that an allowance of a gross sum was not permissible. *Wagstaff v. Lowerre*, therefore, stood upon no existing authority, and it can have only the force derived from its reasoning. In this court the question is an open one, and, so far as we have been able to ascertain, has never been discussed and decided. We ought not to wander from the statute and strain its construction to an extent approaching perilously near to legislation. In the present case the fee of the lands, it is conceded, vested in the grandchildren by force of the will at the date of the death of the testator. The estate of the trustees took priority, but only for the purposes of the trust. (*Stevenson v. Lesley*, 70 N. Y. 512.) They were authorized to sell and to rent the real estate. Upon all sums of money thus realized and passing through their hands, they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remainderman, not through any title derived from the trustees, but by force of the original devise. The trustees transferred no land but simply refrained from exercising their power of converting it into money. And so they not only never paid it out, even constructively by any grant or conveyance, but never even received the absolute fee which all the time was a vested interest in remainder. Their estate was simply commensurate with their trust, bounded as to duration by the terms of the trust, and as to the unsold lands never equalling in value that of the fee. We must, therefore, adhere to the statutory basis of computation, and decline to advance further in a construction which steadily departs from a plain and unambiguous enactment having a definite purpose and meaning. If hardship

or injustice shall result, of which we are by no means certain, the remedy may be readily applied by further legislation.

So much of the judgment as allows commissions upon the value of the unsold lands should be reversed, without cost to either party.

All concur.

Judgment accordingly.

PRICE vs. COURTNEY.

[Supreme Court of Missouri, December, 1885; 2 Western Reporter, 458.]

POWER OF SALE NOT POWER TO MORTGAGE. — SUBROGATION ON
LOAN TO EXECUTOR.

A general power of sale, with the further authority that "in and about the entire management and control" of testator's property the executor should "have full power to do with the same as I would were I living," will not authorize a mortgage by the executor.

It seems a loan to an executor, secured by a void mortgage on his testator's estate, creates no equity of subrogation or otherwise in favor of the lender.

ACTION to declare void a trust deed.

George P. B. Jackson, for plaintiffs.

Wm. S. Shirk and Draffen & Williams, for respondents.

RAY, J. By a stipulation filed in the above entitled cause it is agreed that they are cross appeals and belong to the same cause and are submitted on the same briefs and abstracts.

The object of the suit is to have declared null and void a deed of trust on certain lands and the note thereby secured which were executed to Mentor and D. W. Thomson.

This litigation arises in regard to the will of H. M. Price

and the powers therein conferred on Courtney, the executor, trustee, guardian and curator therein named.

The provisions of said will, so far as material to the present controversy, are in these words: "*Second.* I do hereby devise and bequeath to Peter Courtney, of Pettis county, all my estate, money and property, real and personal, wherever situate, all claims and demands due, and all and every kind and interest I may have in all property of every kind, in trust, for the purposes hereinafter stated and set forth. It is my desire, that upon my death, the said Courtney qualify himself according to law and enter upon the administration of my estate; and I do hereby name and appoint him, the said Peter Courtney, as executor of this my last will and testament; that as soon after my death as possible, that he take full and complete charge of my estate. It is my desire that said Courtney manage and control my business and all of my unsettled matters, as he deems best, for my children; that he invest my money or loan it out, or otherwise manage and control it as nearly as I might do it were I living, in whatever manner, in his judgment, may be to the interests of my children. And I do hereby empower him, the said Courtney, to grant, bargain and sell and convey any real estate I may own at the time of my death, at such times and for such price and in such manner as he deems to my best interest; and also to invest my money in real estate, stocks or bonds, or whatever else he deems advantageous, with full power to buy and purchase and to sell, convey and transfer the same. It is my desire that in and about the entire management and control of my said property, that the said Courtney shall have full power to do with the same as I would were I living; and I desire said Courtney to have, keep and preserve said property and all the increase thereof, as trustee for my children, and to be kept and managed by him, for them, until such time as, by the terms of the will, he is required to pay the same over to them. I desire him, the said Courtney, also to act in the capacity of such trustee, as the guardian, as well as the curator of my children, and out of my estate to pay all of the expenses necessary to be incurred in rearing and educating them, so that each shall receive from my estate a support, until

they marry or attain their majority, as well as a good education, and so that, in the final settlement, all may share the estate equally, except as hereinafter stated."

After hearing the evidence in the cause, the substance of which will accompany this opinion, the court made a finding, partly in favor of plaintiffs and partly in favor of the defendants; finding that the will of H. M. Price gave no power to Courtney to borrow money or execute incumbrances upon the land of the estate or heirs of H. M. Price, and that the deed of trust from Courtney to Mentor Thomson, for the use of D. W. Thomson, was null and void, and executed without authority; and also finding that, of the money represented by the note to D. W. Thomson, a portion was used by Courtney to pay taxes on land held in trust by him for plaintiffs as follows: \$137.35 on land in Bates county, \$232.73 on land in Johnson county, and \$88.71 on land in Pettis county, not the land in controversy, and that the defendant, D. W. Thomson, is entitled to enforce payment out of the land in controversy of the sum of \$459.29, so paid for taxes, and that said sum with interest and costs of this suit, should be a lien on the land in controversy, and that said land should be sold to satisfy the same; and judgment was entered accordingly.

From this decree both parties appeal; the heirs of Price, the plaintiffs, because any lien was decreed against their land to pay any money borrowed by Courtney from D. W. Thomson, and to secure which he had executed the deed of trust to Mentor Thomson, on the land in controversy.

The defendants appeal from the decree, because they claim that the deed of trust should not have been set aside and declared null and void, but that the entire decree should have been in their favor. So that these two cross appeals present for determination two questions: 1. Whether the will conferred power on Courtney to make a valid deed of trust on the land of his wards; 2. Whether, if no such power was conferred as aforesaid, the decree was authorized which gave a lien on the lands of the heirs for money which Courtney had borrowed of Thomson and ordered a sale of such lands in discharge of such lien. These questions will be considered in

their proper order ; because it is apparent that if Courtney had the power bestowed upon him by the will, to incumber the estate by mortgage or otherwise, that the entire decree instead of only a portion thereof should have been in favor of the defendants.

Did Courtney then have such power conferred on him by the will of his testator ?

After attentively considering the terms of the will and examining the authorities on the subject, we have arrived at the conclusion that no such power was conferred.

It is to be observed of the will under consideration, that it nowhere in express terms confers any power on Courtney to mortgage or otherwise incumber the property devised to him by his testator. Nor do we think such power is to be inferred by the exercise of any reasonable implication. The power conferred by the will, whatever its extent, was a mere naked power. (*Waldron v. McComb*, 1 Hill, 111.) A devise that executors or others may sell is always thus construed. (1 Chance's Pow. 52-53, Lond. ed. 1831.) And the degree of strictness with which such powers are construed is a very familiar rule to the profession.

This subject will be found learnedly and elaborately discussed in the case of *Bloomer v. Waldron* (3 Hill, 361), by that eminent jurist, Judge Cowen. The action was ejectment, and the question was whether a sale under a mortgage, made professedly in execution of a power assumed to be conferred by the will, passed title or not. The will was very much such an one as that now before us ; it devised certain land to the testator's widow during her widowhood for the support of herself, three daughters and one P., and in case of her death, &c., to P. during his life for the support of himself and the daughters, with remainder to the daughters in fee ; it also gave to the widow while she remained single, and to P. after her death or remarriage, full power and authority to sell and convey all or any part of the estate, provided A. B. should consent in writing ; the moneys arising from such sales to be invested and secured for the purposes of the will, as A. B. should direct. The widow mortgaged the land in fee to raise money for the support of the persons named in the will. A sale of the land

took place by reason of an equitable foreclosure. The mortgage contained the written consent of A. B., and professed to be given under the power conferred by the will, and after the death of the widow, P., with the view of confirming the title of the purchaser, executed to him for a nominal consideration, a deed in fee for the land thus sold, and this deed also contained the written consent of A. B. and professed to be executed under the power conferred by the will. But it was held that the whole transaction was void; that no title passed, because, while there was a power to "sell and convey," there was no power to mortgage the land devised. In delivering the opinion in that case, Judge Cowen, among other things, said: "Let us then first consider the language of the power, which is simply to sell and convey. It was admitted at the bar, that these words do not in themselves, as a general rule, confer the power to mortgage. That they do not, is admitted in books of the highest authority (1 Sugd. Pow. 538, 6th Lond. ed.; 1 Pow. Mort. 61, Rand's ed. and note i; 3 Id. 1033, note a), and insisted on at large by others (2 Chance's Pow. 388, Lond. ed. of 1831); though the contrary has sometimes been asserted without sufficient qualification. (1st Am. from 3d Lond. ed. Sugd. Pow. p. 478; Savage, Ch. J., in *Williams v. Woodard*, 2 Wend. 492; Lord Macclesfield, in *Mills v. Banks*, 3 P. Wms. 9.) A man leaves with his neighbor a power of attorney to sell and convey his farm; who would ever suppose, had it not been for some random expression in the books, that the attorney could give a mortgage, which, with us especially, is but a pledge to secure money loaned? A man tells another to sell his horse; who would say that he could pledge the horse for any sum he might borrow? Such a construction would be absurd; and the most we can say is, that when the power is to sell, and something is added over and above showing that the power of sale is not to be taken in its primary sense, but means a power to mortgage, there the donee may act accordingly. The principal may always make his own vocabulary. He may say, I authorize a sale, by which word I intend a mortgage. A power to sell and raise a sum of money has been said to evince that intent. This, however, has been put by Sugden with a

semble, and rests entirely on the *dictum* of Lord Macclesfield in *Mills v. Banks*. All the books are traceable to that, and no other authority was mentioned at the bar. Yet in the very same opinion he says: 'I cannot but think it to have been but a due and just resolution in the case of *Butler v. Dunscomb*, that all trusts of terms directing the methods of raising money imply a negative, viz., that the money should be raised by the methods prescribed and not otherwise.' Mr. Chance insists that the case of *Mills v. Banks* is misunderstood when cited to show that a power of sale, even to raise a specific sum of money, will authorize a mortgage. (2 Chance's Pow. 388, Lond. ed. 1831.)

"When a man directs a sale of his land, whether his object be to raise money or not, he means to put it in market for what it will fetch at the time, and avoid the fluctuation of prices. An absolute title and delivery of possession will fetch more than a mere pledge; at any rate there is a substantial difference between raising money by mortgage and sale; and it is enough to say that a power to raise it by one of these methods puts a negative on the other."

The same idea pervades the text-books. Thus, in Perry's Tr. it is said: "A trust with a power of sale 'out and out' will not authorize a mortgage; and a trust for sale, with nothing to negative a settler's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage." (§§ 768-9, and cases cited; 1 Jones' Mort. § 129.) In *Taylor v. Galloway* (1 Ohio, 232) it is said: "The power must be strictly pursued and must be executed according to the manifest intention of the testator. The power is to sell, and the sale must be for money, and the trustees are not authorized to exchange or *incumber* the land, or to dispose of any part of it to perfect a title to the residue."

In *Mills v. Banks* (3 P. Wms. 9) it was decided that, "A power to sell and raise a sum of money implies, it seems, a power to mortgage, which is a conditional sale." "Although," says Mr. Sugden, in speaking of that case, "this cannot be treated as a general rule." (1 Sugden's Pow. 513.) That case was followed in *Ball v. Harris* (4 Mylne & Cr. 267), but the

principle of it was denied by Lord Langsdale in *Haldenby v. Spofforth* (1 Beav. 391), and by Mr. Sugden, then Lord St. Leonards, in *Stroughill v. Anstey* (1 De G., M. & G. 645), holding that the general rule is that a power of sale does not authorize a mortgage, and requiring as authority for a mortgage that the power of sale should have been given as a means of raising a particular charge, and that the estate was devised subject to the charge. This view was adopted by Sir J. Romilly, Master of the Rolls, in *Devaynes v. Robinson* (3 Jur. N. S. 707; 24 Beav. 86).

These cases, with *Bloomer v. Waldron* (*supra*), are quoted and approved in *Ferry v. Laible* (31 N. J. Eq. 567, 574-5); and to the same effect are *Page v. Cooper* (16 Beav. 396); *Wood v. Goodridge* (6 Cush. 117); *Morris v. Watson* (15 Minn. 212); *Coutant v. Servoss* (3 Barb. 128); *Tyson v. Latrobe* (42 Md. 325); *Hubbard v. German Cath. Cong.* (34 Iowa, 31).

In *Hoyt v. Jaques* (129 Mass. 286) the court uses this language: "The two transactions of a sale and a mortgage are essentially different; a power to sell implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land; a power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken in a foreclosure for only a part of its value. As under a will a trust with a power to sell, *prima facie* imports a power to sell out and out and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the intention of the testator."

The above quotations fully sustain the position we have heretofore announced, that no power was bestowed by the will on Courtney to mortgage or otherwise incumber the property devised by the will, and hence that the deed of trust executed by him was void. Nor is that conclusion in the least affected by the words in the latter portion of the will, to wit: "It is my desire that in and about the entire management of my said property, that the said Courtney should have the full power to do with the same as I would were I living." These words, though very broad, are not to be construed as any additional grant of power, but as only referring to the power of sale pre-

viously granted, and declaring that such power might be as fully exercised by Courtney as the testator himself could exercise it were he living.

We pass now to consider the question of the lien and that portion of the decree which sought to enforce it. The money loaned to Courtney by Thomson was not loaned for any special purpose, nor for the purpose of removing any lien for taxes on the lands of the wards, nor did Thomson understand that it was to be so applied, nor was it thus applied. But even had it been loaned for that specific purpose and applied in accordance therewith, such loaning and such application would have created no equity, of subrogation or otherwise, in favor of him who loaned the money to remove the lien. This point was expressly so decided in *Wooldridge v. Scott* (69 Mo. 669). It is true that was a case where the money was loaned in order to remove a vendor's lien, but this cannot alter the principle which must underlie all similar transactions. It may be remarked that at the present term of this court, in the case of *Price v. Estill* (2 West. Rep. 455), in an opinion delivered by Norton, J., a lien attempted to be created by Courtney, in similar circumstances to those in the case at bar, was held to have no existence. That case, in all essential points, so far as concerns any lien, is like the present one, and that case on those points is therefore decisive of this.

Owing to the disposition to be made of this cause, it is unnecessary to comment on the propriety of the decree enforcing a lien on the land in controversy for the payment of taxes due on other land.

In so far as the decree of the court below declared and adjudged the deed of trust made by Courtney null and void, it is affirmed; and in so far as that decree adjudged that a lien existed and should be enforced against the lands described in the deed of trust, it is reversed and the cause is remanded, to be proceeded with in conformity to this opinion.

All concur.

Subrogation in favor of one who lends money to an executor on an unauthorized mortgage.—In the case of *Price v. Estill* (2 Western Rep. 455), referred to in the leading case—an action growing out of the settlement of the same estate—it appeared that Courtney, as executor of the estate of Price, loaned \$2,000 of the money of the testator to one H., and to secure the loan took a deed of trust on certain lands, the subject-matter of controversy in this suit, and that H. having made default, the land was sold and purchased by Courtney, to whom, as guardian and curator of the heirs of Price, the land was conveyed. In his final accounting Courtney credited himself \$2,000, stating that he had been compelled to buy the land taken as a security for the loan. Subsequently, Courtney, holding himself out as executor and trustee of Price, though he had made his final settlement as executor a year before and been discharged by order of court, conveyed by deed of trust to F., trustee for C., the land in controversy which he had bought of H. to secure the payment of a note made by him in his individual capacity to the order of C. for \$900. Default having been made in the payment of the note, F., the trustee, sold the land, and conveyed it to Estill, the defendant in this suit, who purchased it at the sale. The plaintiffs, who are the children and heirs of Price, brought suit, alleging that at the time the deed of trust was executed by Courtney to F. he had no authority to borrow money for them or to incumber their real estate; that the \$900 borrowed by Courtney was a transaction of his own, and on his own account, and that at the time he was largely indebted to their father's estate. The defendant, Courtney, filed no answer, but made default. Estill answered that, at the time Courtney took the deed of trust on the land in controversy to secure the loan of \$2,000 made by him to H., one M. had a prior lien on the land for \$3,000, which H. owed to M.; that in order to pay off this prior incumbrance, and thus secure the land for the heirs of Price, Courtney borrowed the \$900 referred to, and made the deed to F. to secure the payment; that of the \$900 so borrowed, \$855 90 was paid to M. to relieve the land of the prior lien, and that the defendant Estill bought the note for \$900, before maturity for value, and without notice of any equities in favor of the estate of Price. It further appeared that when Courtney borrowed the \$900, he had in his hands property and funds of the estate more than sufficient to have discharged the prior lien which M. had on the land of H., and that the loan was regarded by F. and C. as a loan to Courtney, individually, and not to the estate or heirs of Price. Upon this state of facts, the trial court held that the deed of trust made by Courtney to F., to secure the loan of \$900, was void for want of power in Courtney to make it, but that the money borrowed by him was a charge on the land, and that the land must be sold for its payment. Upon appeal this judgment was reversed in so far as the land was charged with the payment of the borrowed money, the appellate court laying

down the rule that an executor has no power, as such, in the absence of an express provision in the will, to mortgage real property belonging to the estate, and that, when a trust deed of such property has been taken from an executor after his discharge, under a mistake of law as to his power to make it, to secure money borrowed by the executor to pay off a prior lien existing on the same property, when bought by him for the estate, the proceeds of the loan having been treated by the executor as his own and not charged to him, he having, however, credited himself in his accounts with all disbursements made to extinguish the prior lien, the land is not charged with the payment of the money so borrowed.

The court say: "In view of the fact that Courtney had no power to incumber the land of his wards by deed of trust to secure the loan made to him, and the further fact that the proceeds of the loan were treated by him as his individual money, and the further fact that the plaintiffs have paid, by the allowance of credits to Courtney in his settlements with the Probate Court, all the money which went to the extinguishment of the lien of M., we are of the opinion that the decree charging them again with its payment is erroneous, and ought not to stand." See also *Wooldridge v. Scott*, 69 Mo. 669.

In *Gans v. Thieme*, 93 N. Y. 225, the facts were, that T. died seized of certain premises subject to a mortgage of \$2,000, bearing interest at seven per cent., which he was personally bound to pay. His widow, who was executrix under his will, subsequently married B. For the purpose of paying off the mortgage and getting a loan at a lower rate of interest, the executrix and her second husband borrowed of the plaintiffs \$2,000, upon the understanding that the premises were to be the primary fund for the payment thereof, and that the plaintiffs should stand in the place of the original mortgagee. The loan was used in taking up the old mortgage, which was satisfied of record. Mr. and Mrs. B. executed to the plaintiffs their bond, with a new mortgage, in both of which the latter was described as executrix. Neither she nor B., her husband, had any personal interest in the premises, and she had no authority as executrix to give a mortgage. The court held that the plaintiffs, as against those devisees who took the premises under the will of T., were entitled to have the satisfaction piece cancelled, and to be subrogated to the lien of the original mortgage. In the opinion, the court say:

"It is no doubt true, however, as the learned counsel for the respondents argues, that a volunteer cannot acquire either an equitable lien or the right to subrogation (*Sandford v. McLean*, 8 Paige, 122; *Wilkes v. Harper*, 1 N. Y. 586; 2 Barb. Ch. 338), but one who, at the request of another, advances his money to redeem or even to pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement one

would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence' (*Cheeseborough v. Millard*, 1 Johns. Ch. 409; 1 Story's Equity Jurisprudence, § 498), and is resorted to for the purpose of doing justice between the parties. Here the defendants have no equity. In any aspect of the case the plaintiffs have paid a debt which the testator ought to have paid and a mortgage to which the land was subject, under the belief authorized by the words and acts of the legal representatives of the deceased, that they were to have a valid security upon it. It has not been given to them, and it will subserve the purposes of justice and violate no rule of law to subrogate them to the lien of the mortgage as against any of the parties to this action, since their title was affected by it (*Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625), and no wrong can be done to either by putting the plaintiffs in the place of the original creditor."

It is a settled rule of law that, where one advances to another money to pay a lien on the latter's property, and he is to receive a security for his loan, and the security given is for any cause void, the lender will be subrogated by a court of chancery to the rights of the paid lienor, and may enforce them as far as necessary to make good his debt, where no prior equities have intervened. *Patterson v. Birdsall*, 64 N. Y. 294; *Barnes v. Mott*, Id. 397; *Green v. Millbank*, 3 Abb. N. C. 138; *Clarke v. Barnes*, 76 N. Y. 301-305; *Johnson v. Parmley*, 14 Hun, 398; *Snelling v. McIntyre*, 6 Abb. N. C. 469; *Stover v. Wood*, 26 N. J. Eq. 417; *Reed v. King*, 23 Iowa, 500; *Reagan v. Hadley*, 57 Ind. 509; *Sheldon on Subrogation*, §§ 8, 19, 20; *Russell v. Mixer*, 42 Cal. 475; *Bruce v. Bonney*, 12 Gray, 107.

The jurisdiction of a court of equity where an agreement to execute a mortgage has not been carried out, or where, through fraud, accident, or mistake, a mortgage is improperly executed, is firmly established. *Chase v. Peck*, 21 N. Y. 581; *Matter of Howe*, 1 Paige, 125; *Hatch v. Morris*, 3 Edw. Ch. 313; *Moore v. Thomas*, 1 Oregon, 201.

COLLINS vs. MAC TAVISH.

[68 Maryland, 166.]

POWER TO MAKE INVESTMENTS.—LEASE FOR NINETY-NINE YEARS.

Under a residuary devise to testator's wife, in trust for her use during life, with power on the consent of persons named to make such "change of investments" and "re-investment" as might be proper in her estimation, and to execute all needful deeds and leases, a lease for ninety-nine years, renewable forever, of unimproved property, is authorized.

ACTION to compel performance of an agreement to lease.

Francis P. Stevens, Richard Bernard and Arthur W. Machen, for appellants.

S. Teackle Wallis, Jr., and *S. Teackle Wallis*, for appellee.

MILLER, J. In this case the authority of the appellee to make leases is founded upon the will of Charles Carroll MacTavish, which was admitted to probate in March, 1868. By this will the testator devised his residuary estate to his wife (the appellee), Marcella MacTavish, her heirs, executors and administrators in trust to apply the income and revenue thereof to her own use during her life, and after her death he devised the same to his four children, but subject to certain limitations which it is unnecessary to state. Then, with respect to the powers of the said Marcella, he makes the following provisions :

"I hereby authorize and empower my wife, as trustee aforesaid, so long as she shall remain unmarried, and her successors in this trust with the consent of Thomas C. Yearley during the lifetime of the latter, and, after his death, with the consent of Daniel J. Foley, and after Mr. Foley's death, with the consent of her brothers-in-law, Henry Scott and Gould Hoyt, the two last persons to be consulted until such time as two of my children shall arrive at the age of twenty-one years, when said children and my remaining children as they respectively arrive

at twenty-one years of age are to be consulted, and with their consent to make such *change of investment* of my estate and such re-investment and changes thereof from time to time as may be in the estimation of my said trustee proper and advantageous, *to which end* I hereby authorize and empower my said trustee to do all lawful acts and things, and execute and deliver all needful deeds, *leases* and other instruments of writing in the premises with the consent and authority aforesaid."

"And I further declare it to be my will and intention that my said wife, trustee as aforesaid, shall continue to exercise the rights and powers conferred upon her as above stated, so long only as she shall remain unmarried, and that should she contract a second marriage, then the said trust to cease, and I hereby constitute and appoint her brothers-in-law, Henry Scott and Gould Hoyt, as and for my trustees in her stead, to take charge of my estate immediately after such marriage, and I hereby confer upon them all the powers previously conferred upon and exercised by my wife, as trustee aforesaid, subject to the same conditions."

This case was argued with the preceding one, and it is not therefore necessary to repeat what we have said in our opinion in that case in reference to questions which are common to both.

It is very clear that under this will the leasing power is not open to the objection of transgressing the perpetuity rule, for in no event can either the power or the trust continue for a longer period than the widowhood of Mrs. MacTavish and the lives of Scott and Hoyt. Nor have we any difficulty as to the objection that the assent to the lease of the children, who had attained majority, had not been attained. The will requires the assent of different parties at different times, and whose assent was necessary in this case depends upon the question who were required to assent on the 10th of March, 1876, the date of the contract for the lease? At that time only *one* of the children had attained the age of twenty-one, and by the plain terms of the will the assent of the children was not required until *two* of them had attained that age. The assent of Mr. Yearley was all that was then required, and this assent is secured to the ap-

pellants by the decree appealed from. The object of the bill in the case is to enforce specific execution of the contract of the 10th of March, 1876, and if it was good in this respect at the time it was made, the appellants cannot escape the obligation to execute it because the assent of *other parties* may have become necessary to leases made at a subsequent period.

The only remaining objection that need be noticed, is that the power is given for the purpose of changing investments, and a lease for ninety-nine years, renewable forever, is not a good execution of such a power. It may be true that the usual mode of effecting a change of investment is by a *sale* of the property or securities in which the original investment stands, and putting the proceeds in other property or securities; but the question here is, what was the intention of the testator in this respect? In this, as in other parts of his will, that intention must prevail unless it contravenes some established rule of law. The testator speaks of a "*change of investment*" of his "*estate*," and a part of that estate consisted of vacant unimproved lots in Baltimore city. Now the owner of such property who wished to make it productive or available, and was unable or unwilling to improve it himself, could either sell it outright and invest the proceeds in other securities, or lease it under perpetual leases reserving a substantial annual money rent. It seems to us clear that the testator intended the latter course might be adopted with respect to this portion of his estate; for he not only fails to give a power of *sale* in direct terms, but expressly confers upon the trustee the power to execute *leases*. Such leases would practically work a change of investment of so much of his estate as consisted of or was invested in these unimproved and unproductive city lots. As explained in *Banks v. Haskie* (45 Md. 217), the owner and lessor secures by such a lease the prompt payment in perpetuity of the interest on a sum of money equivalent to the value of the property in fee at the time the lease is made. By this means he derives an income from his land, and makes a "*secure and permanent investment of its value* in the land itself." We are therefore clearly of opinion that the appellee had the power to make

the lease in controversy, and that the appellants will acquire a good title thereunder.

Decree affirmed, and cause remanded.

WHITE vs. DITSON.

[Supreme Court of Massachusetts, January, 1886; 1 New England Reporter, 485.]

LANGUAGE CREATING A TRUST.—EXECUTOR WHO IS ALSO TRUSTEE.

—DISCHARGE OF.—LIABILITY OF SURETIES ON BOND OF.

A residuary devise to a person "to be disposed of by him for such charitable purposes as he shall think proper," creates a trust.

An executor who is also trustee can only discharge himself in the former capacity by some open and notorious act in the Probate Court.

The sureties on a bond given by an executor who is also charged with trust duties, conditioned to administer according to law all testator's goods, chattels and credits, and the "proceeds of all his real estate that may be sold for the payment of his debts and legacies," are liable for the residue of the personal estate received by him as executor, and not applied in discharge of the trusts committed to him, but not for the proceeds of real estate sold under a trust power and not by authority derived solely from the Probate Court.

ACTION on an executor's bond.

E. M. Johnson, for plaintiff.

W. G. Russell, Jabez Fox and R. Lund, opposed.

DEVENS, J. The defendants, who are the sureties on the bond of the late John P. Healy, as executor of the will of John Percival, having admitted a breach thereof, the case at bar has been referred to an assessor to report the facts, and is now before us upon a reservation of the questions of law raised

upon the facts stated in his report and in the subsequent agreement of additional facts by the parties.

It is not denied that Healy, as executor, paid all the debts, specific legacies and funeral expenses of the testator. The first and most important inquiry is as to the responsibility of the sureties for that which came into his hands under the residuary clause of the will.

This is in the words following: "All the rest and residue of my property and estate, real, personal and mixed, of which I shall die seized or to which I may be entitled at the time of my decease, I give, devise and bequeath to the said John P. Healy, to be disposed of by him for such charitable purposes as he shall think proper." This clause is preceded by one which gave to Healy a sword and portrait of the testator, to be disposed of "in such a way and manner" as he may think "fit and proper." The earlier clause differs from that we are considering in the important respect that no restraint is placed upon the disposition Healy might make of the articles therein bequeathed, while the property bequeathed by the latter clause is "to be disposed of" by him for "charitable purposes," although the selection of the objects of the charity which should receive the bounty was left to Healy.

The word "charitable" has a distinct legal meaning, derived from the statute of 43 Eliz. ch. 4, from the construction given to it in the definition of the objects of charity, and from the application of the statute to other uses which are not included in those there enumerated, but which come within its spirit by analogy. While the gift to Healy is not, in terms, in trust, the object for which it is confided to the donee distinctly appears to be its distribution to charitable purposes. For this only it is intrusted to him. He took the gift for no purpose personal to himself nor in any manner for his own use, and had no beneficial interest therein. It is not material, therefore, that the words "in trust" are not found in the terms of the bequest. (*Nichols v. Allen*, 130 Mass. 211; *Schouler, Petitioner*, 134 Mass. 426.)

While a bequest which could be applied to purposes other than charitable might be held too indefinite to be carried out,

the limitation of its distribution to purposes well defined and deemed worthy of particular protection, even if various, would enable the court, were the fund still in the hands of the trustee, to compel him to execute this clause of the will by the selection of the charitable purposes to which the fund should be devoted. The testator has shown his intention to dispose of this gift for charitable purposes generally, and a confidence has been reposed in the trustee to make a selection of the objects of charity. If, therefore, the trustee proceeds in good faith and with reasonable diligence to divide and distribute such a legacy for purposes which could properly be called charitable, either by directly applying it to objects thereof, or transferring it to responsible societies or associations formed for such purposes, a court of chancery would not interfere with the exercise of his discretion. Should he refuse to do this, there would be no serious difficulty in compelling, by the proper agencies of such a court, the execution of the trust, and in preventing the fund from being misappropriated to selfish uses. (*Saltonstall v. Sanders*, 11 Allen, 446; *Loring v. Marsh*, 2 Cliff. 469; s. c. 6 Wall. [73 U. S. bk. 18, L. ed. 802]; *Marsh v. Renton*, 99 Mass. 132; *Att'y-Gen. v. Gleg*, 1 Atk. 356.)

Whether the power to select charitable objects was strictly limited to Healy, on account of the personal confidence reposed in him, so that if he had declined to accept the trust, or if he had deceased without completing the execution of it, it could not be executed by the intervention of the court, and, the trust thus failing, the fund should go to the next of kin; or whether, the testator having distinctly shown his intention that it should be devoted to charitable purposes generally, it should be held that the power of selection was attached to the trust, so that it might be executed through a trustee, who should carry into effect the controlling purpose of the testator under the supervision of this court, is a question not necessary now to be discussed. (*Loring v. Marsh*, *ubi supra*; *Fontain v. Ravenel*, 17 How. 369 [58 U. S. bk. 15, L. ed. 80].)

The first inquiry is as to the liability of the sureties. While Healy fully completed the administration of the estate, by the

payment of all debts, legacies and expenses, he settled no final account as executor, and did not by any open and notorious act discharge himself as such in the Probate Court, by assuming to transfer the residue of the property to himself as trustee, or by any other act indicating an intention thereafter to hold the same for the purposes of the trust. The will gave to him two characters, those of executor and trustee; and the duties of the latter character were entirely distinct from and independent of those of the former. As actual payment cannot be made by one to himself, it has been held that where the same person is executor and trustee, he must give a bond in his character as trustee before he can exonerate himself from his liability as executor. (*Hall v. Cushing*, 9 Pick. 395; *Dorr v. Wainwright*, 13 Pick. 328; *Newcomb v. Williams*, 9 Met. 525-534; *Conkey v. Dickinson*, 13 Met. 5; *Daggett v. White*, 128 Mass. 398; Gen. Stats. ch. 100, § 14.)

While it is not controverted by the defendants, that if a case were presented where the trustee was legally compelled to give bonds, it would be necessary to show, by compliance with this requirement, that a transfer of the property was made by the executor, their principal contention is, that such is not the case at bar; and that if it can be shown that Healy had fully completed his duties as executor, it must be held that the residue of the property was lawfully retained by him as trustee. This question will be of less interest hereafter, as, by the statute of 1873, ch. 122 (Pub. Stats. ch. 141, § 16), every trustee is required to give at least his own personal bond, which certainly contemplates that where the same person is executor and trustee there shall be a distinct transfer of property to him in the latter capacity, by authority of the Probate Court. (*Parker v. Sears*, 117 Mass. 513.)

Even if this were a case where the trustee might be and was by the will exempted from giving bond, we should not be prepared to say that the facts that Healy ceased at a certain time to do any acts as executor, all that was necessary in that capacity being then completed, and thereafter did certain acts showing an intention to execute the trust, were alone sufficient without any settlement of his accounts as executor in the

Probate Court, to exonerate him and the sureties on his bond as executor. There should, in that case, be some public act which could only take place in that court, indicating a discharge of himself in one capacity and the acceptance of the trust imposed upon him in the other before this transfer could take place. (*Newcomb v. Williams, ubi supra.*) This might, perhaps, be by any definite act assented to by that court, as where an executor, who had been appointed trustee, has also qualified as such, charged himself in his account as executor with money paid to himself as trustee, which account had been allowed. (*Crocker v. Dillon*, 133 Mass. 91.)

In *Taylor v. Dubois* (4 Mason, 131), cited by the defendants, an administratrix, after a decree of the Probate Court ascertaining the distributive shares of the intestate estate, had the guardianship of one of the persons entitled to a share who was a minor; it was held that, by operation of law, she held the amount by way of retainer, as guardian and not as administratrix, and that no suit lay against her sureties upon the administration bond for the amount due her ward. But in that case, by a process in Rhode Island known as *quietus*, an administrator might be fully discharged by the Probate Court. This *quietus*, which was a decree rendered by that court, stated in substance that the administratrix had fully administered the estate, and ordered that "she be and hereby is from henceforth acquitted and discharged of the same." Before this *quietus* she had signed a certificate to the Probate Court, which had been recognized by it, that she had in "her possession and control," as guardian, the shares of the minor whose property was afterwards wasted.

State v. Hearst (12 Mo. 365), *Coleman v. Smith* (14 S. C. 511), and *Carroll v. Bosley* (6 Yerg. 220), also relied on by the defendants, are all cases where the question of responsibility arose between sureties, on the bond of the principal defendant as administrator, and the sureties on his bond as guardian. In these it was held that when the time for the settlement of the estate as administrator had fully expired and the distributive share of the minors had been ascertained, it must be deemed that thereafter the funds were held by the principal defendant

as guardian, as that was the capacity in which he had the right then to hold ; and that the property was thus by operation of law vested in him as guardian. But we are referred to no case where the same person was administrator and guardian and had failed to qualify in the latter capacity, in which it has been held that the sureties on his bond as administrator were discharged. The ground upon which the transfer of the property is presumed to take place, namely, that one shall be deemed to hold in that capacity in which he ought to hold, has no existence where the principal has not qualified as guardian.

The will by which Healy was appointed a trustee for the distribution of the residue of the estate for "charitable purposes," did not exempt him from giving a bond ; but the defendants contend that Healy was, from the character of the trust, so situated that he could not properly have been required to give bond ; and that, therefore, as it is shown by a variety of facts that after 1865 he held the property as trustee, he must be deemed to have discharged his sureties on his bond as executor. If it were true that he was entitled to enter upon his duties as trustee without giving bond for their faithful performance, there would be force in this position, especially if, the debts and legacies having been paid, the residue had been ascertained by a proper decree of the Probate Court settling his account. But no such decree was ever made, nor was the trustee entitled to enter on his duties without giving bond.

The defendants, upon this point, rely on the case of *Lowell, Appellant* (22 Pick. 215), which is followed in *Drury v. Nat- ick* (10 Allen, 169). It is decided in *Lowell, Appellant*, that, where property is given to trustees for the purpose of a general charity, such as the gift there in question, which was for the promotion of education and the advancement of science by a permanent institution, and where the testator had provided for the perpetuation of the trusts and for a continuous succession of trustees, without reference to the probate law, and where he also had appointed perpetual visitors of his charity, it was not a gift in trust for any person or persons within the true in-

tent and meaning of the statute; and that in such case the trustee was not required by law to give bond before entering upon the duties of his trust.

The distinction between this case and that at bar is obvious. There is here no public charity, indefinite in duration, to be permanently established, where a perpetual succession of trustees is to take, hold and administer the property, provision being made for the rendering and auditing of its accounts and for the supervision of a permanent board of visitors. The administration of a sum of money bestowed under such circumstances and for such a purpose may well be deemed to be beyond the control of the Probate Court. That which is here bequeathed is a sum of money, to be distributed by a trustee for charitable purposes, which consist of the residue of an estate. No institution of public charity is to be founded, although the trustee may undoubtedly transfer the sum bequeathed to institutions formed for that purpose, and no fund is to be permanently held. Within such reasonable time as shall enable the trustee to make proper inquiry, in order to ascertain what individuals or societies coming within the terms of the trust may, in the just exercise of his discretion as trustee, be made the immediate recipients of the testator's bounty, the fund is to be distributed. The ground upon which it was held in *Lowell, Appellant (ubi supra)*, that the provisions of the Rev. Stats. (ch. 69, § 1), and in *Drury v. Natick (ubi supra)*, that the provisions of the Gen. Stats. (ch. 100, § 1), requiring a bond to be given in all cases by testamentary trustees, except where there was a special exemption by will, or where all persons interested consented that it should not be required, had no application to a public charity established in a perpetual succession of trustees, cannot be so extended as to exempt individuals charged with the distribution of sums of money "for charitable purposes," from giving bond to perform their trust.

It is suggested that, in the latter case, those who are to receive the benefit of this sum are entirely indefinite; that the only provision for putting in suit such a trustee's bond is "for the use and benefit of any person interested in the trust estate" (Gen. Stats. ch. 100, § 12; Pub. Stats. ch. 143, § 18);

that no person or institution could thus describe itself; and, therefore, that it cannot have been intended that any such bond should have been given. We cannot assent to this. All persons who are themselves objects of charity, within the legal meaning of the term, and any institutions founded for charitable purposes might become interested. If the court should be compelled to select another trustee, in order to carry out the purpose of the testator, each of those who might become entitled by this selection, as made under the direction of the court, would be interested in the bond given by the original trustee, and might be empowered to bring suit thereon. (Gen. Stats. ch. 100, § 12.) After the decease of the original, if any of the trust fund remained undisposed of, whether it were held that the power of selection was attached to the trust so that it could still be executed, or that it was personal, so that the residue undisposed of would go to the next of kin, there would in either event be persons directly interested in the trust estate.

We are, therefore, of opinion that the sureties on the executor's bond of Healy are liable for the residue of the personal property received by him and not disposed for "charitable purposes." In considering to what extent they are liable, it is necessary to determine whether they are responsible for the proceeds of the real estate sold by Healy. The will not only authorized but directed him to convert the whole real estate of the testator into money as soon after the testator's decease as it should seem expedient, and provided that any deed executed by him should convey as perfect a title as if made by the testator. He was authorized to sell at public or private sale, and did so by authority of the will and not of the Probate Court, within a reasonable time after the death of the testator, receiving therefor the sum of \$4,700. This sum was not needed for the payment of expenses, debts or any specific legacies.

The condition of the bond, according to the statutes in force when it was executed, was in its second clause, which is the only one necessary to be considered: "To administer according to law and the will of the testator all his goods, chat-

tels, rights and credits, and the proceeds of all his real estate that may be sold for the payment of his debts and legacies, which shall come to the possession of said executor, or of any other person for him."

By the Stat. of 1880, ch. 152 (Pub. Stats. ch. 129, § 5), the condition of a bond given under such circumstances was altered by striking out the words "for the payment of his debts and legacies," and inserting the words "or mortgaged." The same statute of 1880 provided that where license or authority was given to an executor, etc., to sell real estate, no special bond to account for the proceeds need be given unless the bond given on his appointment was insufficient. Of course the liability of the defendants is to be determined by the law as it existed when the bond into which they entered was made, and by its terms. The clause, "proceeds of his real estate that may be sold for the payment of his debts and legacies," cannot cover a responsibility for a sale which was not necessary for the payment of debts or any definite legacy. Such proceeds would form a part of the residuum of the estate; but, as remarked by Chief-Justice Shaw, "In common parlance, as well as in a more precise use of language, a 'legacy' is distinguishable from the gift of a residue or share in a residue." (*Quincy v. Rogers*, 9 Cush. 291, 297.)

Had the executor applied to the Probate Court for leave to sell real estate for the payment of legacies, assuming that there was no provision in the will in relation to the subject, it could not have been granted, if there was no existing unpaid legacy, but only a gift of the residuum. The only legacies for the payment of which the real estate could be sold by authority of the Probate Court, were such as were definite, and that which was received from such a sale was the only money for which the sureties on the bond would be responsible. (*Robinson v. Millard*, 133 Mass. 236.)

It has been held in *Alley v. Lawrence* (12 Gray, 373), that a devise to executors in trust for the support of the testator's children, with power to sell and convey any portion of the land, gives them a right to sell and convey in their own names, without giving other bonds than as executors. It was

not necessary there to consider what was the responsibility of the sureties for the money received from such a sale. Whether a power to sell given by will was to be treated as a personal trust and confidence only in executors named, so that it could only be executed by them, or whether, as prescribing the mode of administration of an estate, it would pass to survivors or to an administrator with the will annexed, has also been a question several times discussed in our decisions. (*Warden v. Richards*, 11 Gray, 277; *Greenough v. Welles*, 10 Cush. 571; *Chandler v. Rider*, 102 Mass. 268; *Tainter v. Clark*, 13 Met. 220.)

Even if an executor invested with a power to sell real estate, either as a matter of personal trust and confidence in him, or as a mode of administering the estate prescribed by the testator, which might be exercised by any successor, might make a good title to real estate, it by no means follows that the sureties on his bond would be responsible for the proceeds of such real estate, in view of the limited character of that instrument. The power to sell real estate, independently of that which may be given by the Probate Court for the payment of debts and legacies, is a trust power differing from that which properly belongs to the executor or administrator. It may be that the probate of the will fully invests him with this power and that, even if he should properly give bond, he may convey a good title without doing so, and yet that the sureties on the original bond would not be responsible. All that the sureties have agreed to be responsible for, so far as the real estate is concerned, are "the proceeds of his real estate that may be sold for the payment of his debts and legacies." This is a definite obligation and contemplates a sale of the real estate strictly for these purposes by authority of the Probate Court, as without this authority the executor or administrator, as such, can have no power to sell. To construe it as binding the sureties to be responsible for a sale of real estate, made for no such purposes, but by authority of a trust power given in the will, is to extend their obligation much too far. There is certainly no expression in the bond which covers

a responsibility for real estate sold under authority of the will.

We understand that the argument by which this responsibility is deemed to exist is, that the real estate, having been lawfully turned into money under the power of the will, the proceeds become of "the goods, chattels, rights and credits" of the estate, for the faithful administration of which the sureties were bound. If this argument were tenable, it would follow that when real estate was ordered to be sold, to a greater amount in value than was necessary for the payment of debts and legacies, which the Probate Court is authorized to do when land cannot be divided, the sureties on an administration bond in the form here used would be responsible for the surplus. Yet this is certainly not the case. An additional bond has always in such case been taken for the protection of this surplus, for the reason that the sureties in the original bond have been held not responsible for it, until the recent change in the administration bond. (*Bennett v. Overing*, 16 Gray, 267; *Robinson v. Millard*, *ubi supra*.)

There has been on this subject, it must be conceded, a conflict of authority in the decisions of the several States, not reconcilable by reason of the differences which exist in the form of the bonds considered in the several cases. They were all examined with great care in *Probate Court v. Hazard* (13 R. I. 3). It was there held that, in a suit on an administrator's bond conditioned to administer all the "goods, chattels, rights and credits" of the deceased, the sureties were not liable for proceeds of real estate sold by the executor under a power in the will. The words "the proceeds of real estate sold for the payment of debts and legacies," are not found in the Rhode Island bond; but how strictly these have been limited in Massachusetts is shown by the cases already cited. Even if the real estate had been changed into money, by virtue of a power in the will, it is not, in our view, that personal property for the administration of which the sureties became responsible. The direction of the will that

his real estate should be turned into money did not make it "his goods, chattels, rights and credits," for the administration of which, in addition to "the proceeds of all his real estate sold for the payment of debts and legacies," the sureties became responsible.

In ascertaining the amount for which the sureties are to be held liable, it is important to determine whether any weight should be given to the books kept by Healy, and the evidence by which it was sought to supplement them. That the book which professed to be "the account of the fund left by the will of John Percival to John P. Healy to be used by him for charitable purposes," supplemented by the receipts of the respective societies to whom funds were given, and which shows an expenditure of \$1,100 to three charitable societies, although objected to by the plaintiff, was properly admitted, cannot fairly be questioned. Even if, as executor, Healy failed to settle his account, as it is found that there are no debts and legacies to be paid, if he distinctly devoted, as trustee, the funds left by Percival to charitable purposes, to the extent to which they were thus devoted, the damages would be reduced. That these three gifts were thus set aside from the Percival fund is found by the auditor and the facts fully justify the finding.

The only evidence to show that Healy made other payments from the Percival fund, is derived from the entries in certain family expense books, commencing in 1863, and including items as payments to charities, taxes, personal gifts, etc. By comparison of the amounts expended by Healy during the time covered by these books, and in former years, the defendants seek to establish the proposition that certain sums were expended from the Percival fund in discharge of his obligation to expend it in charity. Unless these family expense books were admissible in favor of the sureties, to show the fact of payments from this fund, we have no occasion to consider the weight and the sufficiency of the evidence afforded by them. If properly rejected by the assessor there was no evidence before him which would have justified a find-

ing in favor of the sureties, as to the sums claimed by them to be thus shown to have been expended. The statements in these books were not even entries made in a book of accounts for the purpose of charging those to whom they were made. They are mere declarations that certain sums were paid by Healy in charity; the payments do not purport to have been made on account of the Percival fund. Such declarations cannot afford legal evidence of payments by Healy in charity; far less of payments from the Percival fund, and were properly rejected by the assessor. Nor was the assessor bound, as contended by the defendants, to render judgment in their favor upon the presumption that the residue in Healy's hands was paid out in accordance with the terms of the trust. Upon this point the burden of proof was on the defendants. (*Choate v. Arrington*, 116 Mass. 552.)

There remain the questions of interest upon the sums for which the sureties are liable, and of any charges or commissions which may properly be deducted. When there is a willful breach of duty, interest may be allowed, with annual rests. (*Jennison v. Hapgood*, 10 Pick. 77, 104.)

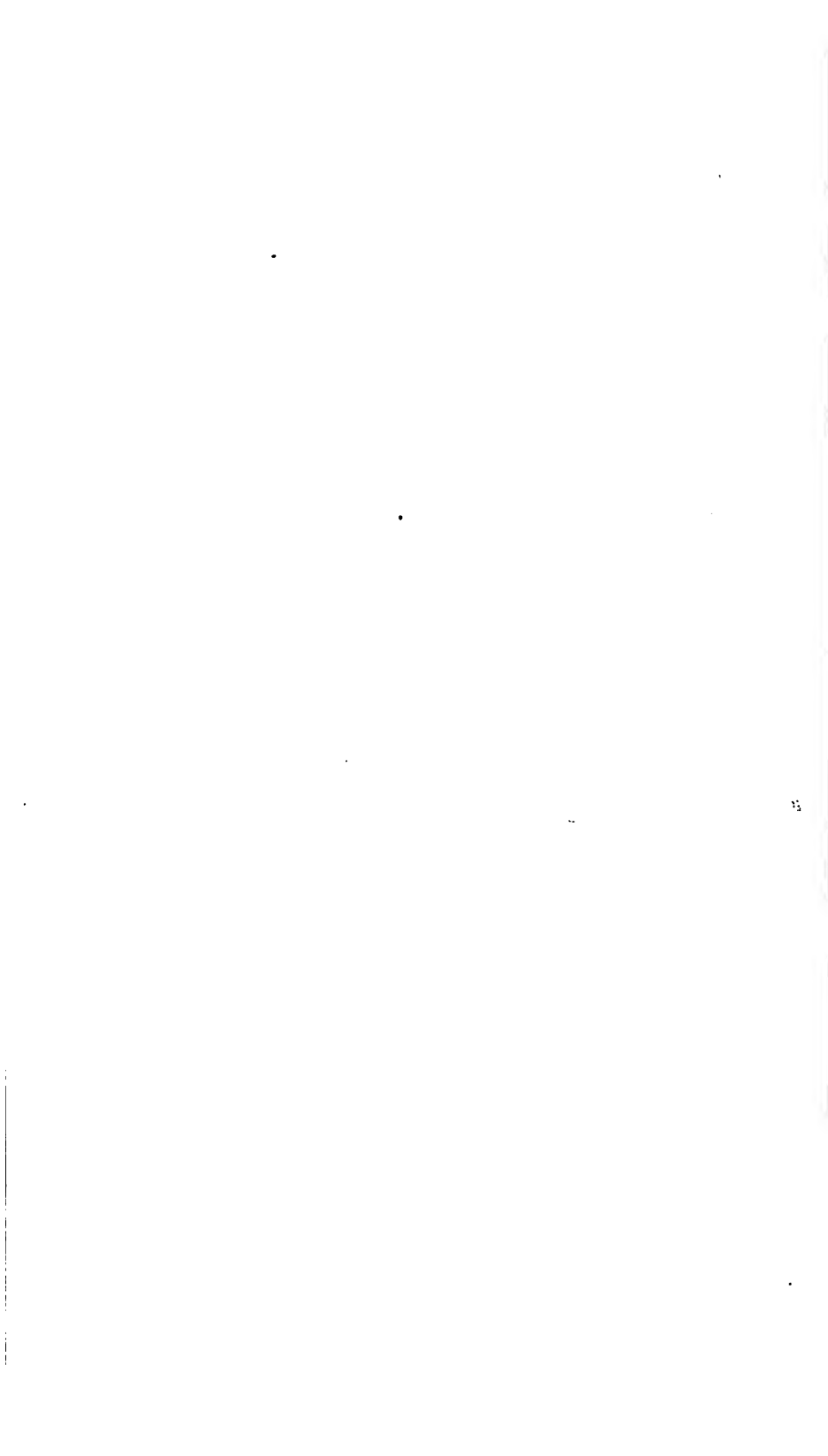
Ordinarily, when a trustee fails to pay over or to distribute money, he should at least be charged simple interest thereon. The question of compensation is also one within the discretion of the court to a large extent and it may be wholly disallowed. (*Brooks v. Jackson*, 125 Mass. 307.)

In view of all the circumstances of the case, no willful breach of duty is shown; it may have been that Mr. Healy wrongly thought, indeed, that no legal duty was imposed on him, but an obligation binding on his conscience only. There has certainly been a failure to pay over the money when it should have been done. Admitting that the trustee was entitled to a certain length of time for the selection of the proper objects of charity, no reason appears why an ample opportunity had not been afforded when he made, in February 25, 1867, the donation to the Ladies' Home Educational Society. The last act done by him strictly as executor was on November 25, 1865, and the whole estate had been converted into personal

property a considerable time previously. Upon the balance then due, deducting the sum of \$4,700, the price of the real estate, simple interest at six per cent. should be computed from February 25, 1867, to the rendition of the judgment, and added to the principal sum. From this should be deducted Healy's commissions of $2\frac{1}{2}$ per cent., as computed by the master, the amount left in his hands.

Ordered accordingly.

INDEX.



INDEX.

ADMINISTRATION.

A grant of administration upon the estate of a living person is void, and can be impeached collaterally. *Devlin v. Commonwealth*, 76;
Thomas v. People, 284

ADMINISTRATOR.

1. An administrator is liable for the loss of the avails of a note misappropriated by a collection agent chosen by him, unless he can show actual necessity for the employment, the use of the best accredited agencies, and in all respects the exercise of the diligence and care of a prudent man in like circumstances. *McCluskey v. Gleason*, 101
2. An administrator is not liable for the loss of funds deposited in a private bank arising from its failure, unless the fact of the bank's weakness was known to him or could have been ascertained by the exercise of ordinary prudence and diligence. *Norwood v. Harness*, 244

ADVANCEMENT.

The acceptance by a child of an advancement in full of his share in his parent's estate bars him, and, in the event of his death intestate, his children also, from any claim thereon. *Simpson v. Simpson*, 485

ALTERATIONS.

A testator cannot, by merely striking out words, alter a will so as to enlarge an estate granted. The original language remains operative. *Eschbach v. Collins*, 17

ATTESTATION CLAUSE.

Effect of. *See EVIDENCE*, 7

BOND OF EXECUTOR.

The sureties on a bond given by an executor who is also charged with trust duties, conditioned to administer according to law all testator's goods, chattels and credits, and the "proceeds of all his real estate that may be sold for the payment of his debts and legacies," are liable for the residue of the personal estate received by him as executor, and not applied in discharge of the trusts committed to him, but not for the proceeds of real estate sold under a trust power and not by authority derived solely from the Probate Court. *White v. Ditson*, 589

CHARITABLE USE.

1. A residuary devise to executors to be distributed by them among "testator's relatives, and for benevolent objects, in such sums as in their judgment shall be for the best," creates a valid charitable use. *Goodale v. Mooney*, 1
2. A bequest of which the income is "to be devoted to the education of the freedmen, and paid over annually to the proper officers of the Freedmen's Association," no association of that name being in existence, is too general and indefinite to be effectual as a charitable use. *Fairfield v. Lawson*, 36
3. A devise of realty to be sold and the proceeds held by the executor on a similar trust or "disposed of as he pleases," is equally void. *Id.*
4. A bequest of money to executors in trust to distribute the same "among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors may select, in such sums as they may designate, is void for indefiniteness and uncertainty. *Prichard v. Thompson*, 92
5. A bequest to executors to be held until a corporation can be formed to take the fund, the object of the gift being stated to be "the founding of a home for aged, respectable, indigent women who have been residents of the city of New London," is valid. *Coit v. Comstock*, 164
6. A bequest to keep certain burial lots in good order and apply the residue of the income to the maintenance of religious services, is invalid. The last object is legal, but the first is not. *Id.*
7. A devise to the city of Baltimore in trust for the "McDonogh Educational Fund and Institute," is sufficiently descriptive of a municipal organization constituted by city ordinance, styled the "Board of Trustees of the McDonogh Educational Fund and Institute," the school managed by the board being known as the "McDonogh Institute." *Barnum v. Mayor of Baltimore*, 291
8. A devise with a direction that what remains at the devisee's death shall be devised by him "to the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith," as he may determine, is valid. *Quinn v. Shields*, 386
9. A residuary bequest "for the preaching of the gospel of the blessed Son of God as taught by the people now known as Disciples of Christ. The preaching to be well and faithfully done," in specified cities, creates a valid trust enforceable in equity. *Sowers v. Cyrenius*, 541

COMMISSIONS.

1. Where, by the terms or true construction of a will, the functions of executor and trustee vested in the same person co-exist from the death of the testator to the final discharge, interwoven so that no point of time is fixed in the will for the expiration of either function, compensation in both capacities cannot be allowed. *Johnson v. Lawrence*, 828
2. Executors who are also testamentary trustees are entitled to commissions in both capacities where the will contemplates a severance of their duties and a point of time when that severance shall take place. *Phenix v. Livingston*, 570
3. Trustees of real estate for the life of another, not being vested with the fee, are entitled to commissions only on moneys passing through their hands, and not on the value of the fee of the property. *Id.*

CONDITIONS.

Testator made a bequest to his widow "on condition that she pay \$50 per year to my daughter, Martha Fox," and if Martha should marry a second time then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife,"—*Held*, that the widow took the property as a trustee for Martha, and the condition against marriage attached to the latter's gift was void. *Crawford v. Thompson*, 57

See DEVISE, 1, 2, 3, 5.

CONSTRUCTION.

1. Testatrix had on deposit with the Citizens' Bank of Raleigh the sum of \$1,000 and some railroad and State bonds. She owned some stock in the Merchants and Farmers' Bank of Charlotte. A bequest by her of "bank stock" in both banks, followed by a disposition of the money deposit, was held to include the bonds. *Clark v. Atkins*, 97
2. A gift of "all my worldly goods, consisting of household furniture, clothing, beds and bedding, money and cattle, also whatever debts may be due me, likewise my house and lot," will not pass other real estate not specifically mentioned. *Farish v. Cook*, 156
3. A husband cannot take under a devise to the "heirs and next of kin" of his wife. *Jeins' Appeal*, 176
4. Testator gave one-third of his personal property to his wife, devised a specified one hundred acres of land to a daughter, adding, "and the rest of my estate personal to be divided among my four sons," held, the court could not supply the words "real and" before "personal," and testator was intestate as to real estate except the one hundred acres devised. *Graham v. Graham*, 181

CONSTRUCTION—*continued*.

5. Under a devise to testatrix's children by name, "in equal proportions," and in the event of either dying before the other, his or her share to be "divided among the survivors or their legal representatives share and share alike," the two children of a daughter so dying take only their mother's share. *Rivenett v. Rivenett*, 264
6. A distribution directed in favor of "my children living, and the children of my deceased children," will not include testator's great-grandchildren. *Cummings v. Plummer*, 279
7. A widow cannot take under a devise to her husband's "heirs." *Dodge's Appeal*, 357
8. A deposit of a sum of money with a third party, on his undertaking to apply the same to the use of the depositor and her husband during their lives and after their deaths to pay therefrom their funeral expenses and the costs of suitable monuments, and to expend the residue in procuring masses to be solemnized according to the ritual of the Roman Catholic Church, creates a valid contract, irrespective of the legality of a trust to say masses. *Gilman v. McArdle*, 399
9. Under a devise to "the male issue then living of testator's son R.," all the male lineal descendants of that son then living should take, whether of the same generation or not, and irrespective of their ancestors being male or female. *Wistar v. Scott*, 548
10. The words "now standing in my name on the books of the company," following a bequest of "eighty-one shares" of stock therein, are evidence of an intention to dispose of only the shares owned by testatrix when making her will, within a statute making every will speak and take effect "as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." *Fidelity Trust Company's Appeal*, 556

COSTS.

An executor is entitled to be paid out of the estate taxable costs and whatever reasonable sum he may have expended in addition thereto in proceedings to probate his testator's will. He is not within a statutory provision awarding costs only to successful parties. *Phillips v. Phillips*, 258

DEVISE.

1. A devise may lawfully be made conditional that the devisee withdraw from the priesthood of a specified church, or from any society connected therewith, or refrain from forming any such connection. *Barnum v. Mayor of Baltimore*, 291
2. A gift of the income of a fund to a married woman so long as she remains the wife of her then husband, and of the entire estate

DEVISE—continued.

- should she "be left a widow, or for any cause should cease to be" his wife, is not contrary to public policy. *Thayer v. Spear*, 451
3. A devise by testator to his wife "so long as she shall remain my widow," is not a "condition in restraint of marriage" within a statute avoiding such conditions. *Hibbitts v. Jack*, 500
4. A devise of real estate without words of limitation vests in the devisee an estate in fee-simple; and this result is not defeated by a devise over of the remainder. *Mitchell v. Morse*, 508
5. A wife devised all her estate to her husband for life, providing, further, that if he survived her it should go to her step-daughter. The husband predeceased the wife, and the latter thereby died intestate. *Gibson v. Seymour*, 517

DISTRIBUTION OF ESTATES.

1. The statutes authorizing married women to hold, convey and devise property as if unmarried, do not deprive the husband of his common law right to her personalty where she dies wholly intestate or only partly intestate through the lapsing of legacies. *Robins v. McClure*, 466
2. Nor is his right affected by his accepting a legacy and qualifying as executor under his wife's will. *Id.*

DOWER.

See ELECTION; LEGACY, 4.

DUPLICATE WILLS.

- Both parts need not be probated, but both may be required to be exhibited to the court. *Crossman v. Crossman*, 121

ELECTION.

1. The acceptance of a provision in a will in lieu of dower bars a widow from any share in lapsed legacies. *Matter of Benson*, 7
2. A court having jurisdiction of the person and estate of an insane widow, may elect for her between her dower right and a provision in lieu of the same. *Van Steenwyck v. Washburn*, 837

EVIDENCE.

1. Evidence is inadmissible to show that testator told the scrivener he had in mind a particular Freedmen's Association organized by the Methodists in Cincinnati. *Fairfield v. Lawson*, 86
2. Where an interlineation in a duplicate will, not offered for probate, is noted above the attestation clause, and is necessary to make it a counterpart of the other will, there is no presumption that the alteration is fraudulent. *Crossman v. Crossman*, 121
3. To make an extraneous document part of a will, it must be clearly referred to therein, and the testator's intention cannot be shown by parol proof. *Baker's Appeal*, 128

EVIDENCE—*continued*.

4. Testator's knowledge of the contents of the will at the time of execution may be shown by circumstantial evidence. *Montague v. Allan's Ex'rs*, 454
5. A will is not invalidated by the fact that it was written by a confidential friend of the testator, whose wife is a legatee thereunder. *Id.*
6. A judgment of a Probate Court of another State, ascertaining the heirs of a decedent under its laws, is not admissible against one not a party thereto, in an ejectment action in this State, as proof of death or heirship. *Morin v. Railroad*, 462
7. A residuary gift "equally to the authorized agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ," creates a valid charitable use, and in determining who are to take thereunder evidence may be received of the names testator called the missionary societies, or by which they were usually known, the interest shown by him in any particular society, and the contributions made by him to missionary purposes. *Hinckley v. Thatcher*, 483
8. An attestation clause signed by the witnesses and corroborated by the circumstances surrounding the execution of the instrument, the testimony of other witnesses to the fact of execution, or other competent evidence, is sufficient to establish a will against the positive evidence of the attesting witnesses to the contrary. *Matter of Will of Cottrell*, 443

EXECUTION.

1. A signature by testator at the end of the third page of a will consisting of four consecutive pages, is a signature "at the end thereof" if it be in fact at the end of the will according to such connection and arrangement of the pages as the inherent sense of the instrument requires. *Baker's Appeal*, 128
2. A signing by testator at the end of the attestation clause is a subscribing "at the end" of the will as required by statute. *Younger v. Duffie*, 544

EXECUTOR.

1. Executors may bid in land sold under a mortgage held by them. *Lockman v. Reilly*, 194
2. The title is vested in them, and distributees or beneficiaries have no estate therein, and they can sell without any express authority in the will. *Id.*
3. The property should be treated and accounted for as personalty. *Id.*

EXECUTOR—continued.

4. Executors directed to sell lands to pay debts cannot become purchasers at sale of such lands under an execution against the testator. *Marshall v. Carson*, 201
5. An agreement upon consideration to renounce an executorship is illegal as against public policy. *Ellicott v. Chamberlin*, 285
6. An executor who is also trustee can only discharge himself in the former capacity by some open and notorious act in the Probate Court. *White v. Ditson*, 599

EXECUTORY DEVISE.

An executory devise cannot be made to depend on the non-execution by the first taker of an absolute beneficial disposing power vested in him by the will creating the limitation, and the fee vests in the first taker. *Van Horne v. Campbell*, 409

FORECLOSURE SALE.

Purchase by executors at. *Lockman v. Reilly*, 194

INCOME.

As to division between life-tenant and remainderman.

See LIFE-TENANT.

INTEREST.

A pecuniary legacy by one *in loco parentis* for the maintenance of the legatee, bears interest from the testator's death. *Townsend's Appeal*, 432

INTERLINEATION.

See EVIDENCE, 2.

INTESTACY.

A wife devised all her estate to her husband for life, providing further that if he survived her it should go to her step-daughter. The husband predeceased the wife and the latter thereby died intestate. *Gibson v. Seymour*, 517

INVESTMENT.

Executors directed to keep funds invested may, when a profitable investment offers itself larger in amount than the available assets of the estate, supplement them with funds obtained from other parties. *Barry v. Lambert*, 149

JOINT WILL.

Tenants in common may dispose of their estates by a joint will. *Betts v. Harper*, 429

JURISDICTION.

A surrogate's court, although of limited statutory jurisdiction, under a general authority to control and settle the accounts of executors and administrators, and to determine on an accounting all questions concerning any debt, claim, legacy, or distributive share, has jurisdiction to determine, on equitable principles, the propriety of allowing an administrator's claim for past maintenance of a minor entitled to a share in the estate. *Hyland v. Baxter*, 478

LEGACIES.

1. The acceptance of a devise of realty by one who is directed to pay a legacy imposes on him a personal obligation to discharge the legacy, which may be enforced without resort to the land. *Porter v. Jackson*, 226
2. A request by testator to his bookkeeper to take charge of the books of his estate and assist in the settlement thereof so long as his services may be necessary, with an allowance of a fixed salary payable monthly, constitutes a contract, and the executor may dismiss the beneficiary for improper performance of his duties. *Harker v. Smith*, 525
3. It is sufficient to constitute a specific legacy that the thing given can be specified and distinguished from the rest of testator's estate at the time of his death, even if not in existence or owned by him at the date of his will. *Fidelity Trust Company's Appeal*, 556
4. A bequest in lieu of dower accepted by election has priority over all other legacies and will not abate with them. *Security Company v. Bryant*, 552

See CONDITIONS, 1; INTEREST.

LEGATEE.

A legatee who has had his legacy abated or absorbed in payment of debts stands in the place of the creditor and may proceed against undivided realty. *Hope v. Wilkinson*, 218

LIFE ESTATE.

1. A devise to testator's widow "to hold the same during her life for her maintenance, but not to sell the same, the said real estate to go to J. M. at her death, if any remains," vest a life-estate in the widow, without any power of disposal. *Birmingham v. Lesan*, 268
2. Where in a will the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital during his life. *Hospital Trust Co. v. Commercial Bank*, 588

LIFE-TENANTS.

1. The right to subscribe for new shares upon an increase of stock, the new stock when issued, and any profit resulting from the sale of the right to such subscription, are part of the principal of a trust fund of shares issued before such increase, and this with a clause in the will directing payments of the "dividends and increase" to the beneficiaries annually. *Brinley v. Grou*, 324
2. All money dividends, including extra dividends or bonuses payable in cash from the earnings of the corporation, belong to the tenant for life of the stock. *Richardson v. Richardson*, 352
3. The gain or loss arising from the sale of stock held in trust is that of the capital of the estate, and the sum received constitutes a new principal. *New England Trust Co. v. Eaton*, 368
4. A trustee who has invested in bonds at a premium may retain annually from the income payable to a life-tenant such sums as will restore to the fund at its maturity what was taken therefrom at the time of purchase. *Id.*
5. Testator died during the continuance of a copartnership agreement which was to last for a term of years even if he died. His will devised the residue of his estate to his wife for her use during life, with remainder over. *Held*, that the life-tenant was entitled to all testator's share in the profits of the firm during its continuance. *Heighe v. Littig*, 537

MARRIAGE.

Conditions against. *See* CONDITIONS, 1; DEVISE, 2, 3.

MARRIED WOMEN.

Husband's common law rights in their personalty when dying intestate are not affected by the statutes authorizing them to hold, convey, and devise property as if unmarried. *Robbins v. McOlure*, 466

MORTGAGE.

Right of executors to buy in lands on which they hold mortgage, and their power to resell same. *Lockman v. Reilly*, 194

Power to mortgage. *See* POWERS, 2, 3, 4.

OMISSION OF CHILDREN.

If the omission of a child from his father's will is intentional, he is not entitled to share in the estate, although such intention is founded on a mistake as to the legal effect of matters outside the will. *Hurley v. O'Sullivan*, 81

PERPETUITY.

See TRUST, 2.

POWERS.

1. A testamentary power to convey a fee is well executed by a deed professing to convey the whole estate in the land although the will is not recited. *South v. South*, 69
2. Power to an executor "to sell, exchange and dispose of" as he may deem necessary for the interests of the testator's children, includes a power to mortgage. *Faulk v. Dashiell*, 81
3. A gift for life with a superadded power of sale, and appropriation of the proceeds, does not confer a power to mortgage or pledge more than the donee's life interest. *Hospital Trust Co. v. Commercial Bank*, 563
4. A general power of sale, with the further authority that "in and about the entire management and control" of testator's property the executor should "have full power to do with the same as I would were I living," will not authorize a mortgage by the executor. *Price v. Courtney*, 575
5. Under a residuary devise to testator's wife, in trust for her use during life, with power, on the consent of persons named to make such "change of investments" and "re-investment" as might be proper in her estimation, and to execute all needful deeds and leases, a lease for ninety-nine years, renewable forever, of unimproved property, is authorized. *Collins v. MacTavish*, 586
See LIFE-ESTATE.

PROBATE.

Where a will is executed in duplicate, both parts need not be probated, but both may be required to be exhibited to the court. *Crossman v. Crossman*, 131

PUBLIC POLICY.

1. A gift of the income of a fund to a married woman so long as she remains the wife of her then husband, and of the entire estate should she "be left a widow or for any cause should cease to be" his wife, is not contrary to public policy. *Thayer v. Spear*, 451
2. An agreement upon consideration to renounce an executorship is illegal as against public policy. *Ellicott v. Chamberlin*, 235
3. An agreement by an heir at law not to oppose the probate of a will on the executor's promise to pay him a sum of money therefor, is founded on sufficient consideration and is not within the statute prohibiting actions to enforce promises by executors to answer damages out of their own estate. *Bellows v. Soule*, 529

REMAINDERMEN.

As to division of interest and income between life-tenant and remaindermen.

See LIFE-TENANT.

REVIVAL OF FORMER WILL.

A prior will is revived by the destruction of a later one not containing any general revocation of earlier testaments. *Peck's Appeal*, 306

REVOCATION.

1. The writing in pencil by testatrix of the words, "I revoke this will," with her signature on the outside wrapper of a will, does not meet the requirements of a statute prescribing the modes of revocation to be by burning, tearing, canceling or obliterating the will, or by a new will, or codicil, or other writing, attested as required in the execution of wills. *Will of Ladd*, 137
2. Drawing scrolls through a signature to a will is not a revocation under a statute requiring that the will be destroyed or canceled in the presence of witnesses in the same manner as the making of a new will. *Gay v. Gay*, 360
3. Under a statute regulating the revocation of wills, and providing that nothing in it "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator," the marriage of a woman revokes existing wills. *Swan v. Hammond*, 534

RULE IN SHELLEY'S CASE.

A devise of the rents and profits of land until the youngest child of the devisee becomes of age, upon the happening of which event "the fee-simple of said lands shall then vest absolutely in said M. (devisee) and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," gives the devisee an estate in fee when his child attains majority. *Shimer v. Mann*, 310

STATUTE OF FRAUDS.

Promise by executor to answer damages out of his own estate, 529

SUBROGATION.

1. A legatee who has had his legacy abated or absorbed in payment of debts stands in the place of the creditor, and may proceed against undivided realty. *Hope v. Wilkinson*, 218
2. It seems a loan to an executor, secured by a void mortgage on his testator's estate, creates no equity of subrogation or otherwise in favor of the lender. *Price v. Courtney*, 575

TRUST.

1. A devise by testator of all his property to his wife, her heirs and assigns, with a "request that at her death she will divide" the same equally between his sons and daughters, constitutes a valid trust. *Knox v. Knox*, 46

TRUST—*continued*.

2. A direction to executors to apply a specified portion of a bequest to inclosing and cleaning up a family graveyard and erecting a monument, is valid, but a gift of the residue in trust to keep in repair the fence and monument is void, as tending to a perpetuity. *File v. Beasley*, 274
3. Deposit to be applied to saying of masses. *Gilman v. McArdle*, 399
4. A residuary devise to a person "to be disposed of by him for such charitable purposes as he shall think proper," creates a trust. *White v. Ditson*, 589
5. A residuary bequest to two persons "as their absolute property," with the request "to use said fund thus given to further what is called the Woman's Rights Cause; but neither of them is under any legal responsibility to any one or any court to do so," is valid. It does not create a trust. *Bacon v. Ransom*, 365

TRUSTEE.

1. The rule avoiding a purchase by a trustee of trust property does not apply where he has an interest therein, and on special application to the court and a hearing of all parties, obtains permission to bid. *Scholls v. Scholls*, 496
2. Commissions of trustee who is also executor.
See COMMISSIONS, 1, 2.
3. When trustee who is also executor becomes liable in latter capacity.
See EXECUTOR, 6.

WILL.

- A writing by deceased, over his signature, on the back of a business letter, ending "and, Ann, after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death," constitutes a valid will of personalty. *Byers v. Hoppe*, 218





